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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK FAUCETT ASSOCIATES, INC., METROPHONE, INC., McKINLEY, SCHMIDTLEIN & MITCHELL, COHEN & ANNAND, P.C., JEROS TACKLE, INC., RAMPART BROKERAGE CORP. and LARKIN GENERAL HOSPITAL, LTD.,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals reversing the district court's application of collateral estoppel because of a purported "possibility" that a second jury might reach a different result on the same issues decided adversely to AT&T by a jury in *Litton Systems, Inc.* v. *AT&T Co.* effectively nullifies this Court's decision in *Parklane Hosiery Co.* v. *Shore* in the District of Columbia Circuit?

STATEMENT REQUIRED BY RULE 28.1

Petitioners, Jack Faucett Associates, Inc., Metrophone, Inc., McKinley, Schmidtlein & Mitchell, Cohen & Annand, P.C., Jeros Tackle, Inc., Rampart Brokerage Corp. and Larkin General Hospital, Ltd. have no parent companies. Thomas Electronics, Inc. is a subsidiary or affiliate of Metrophone, Inc. Horowitz-Blatt Associates and Rampart Agencies are subsidiaries or affiliates of Rampart Brokerage Corp.

Respondents, named as defendants in the proceedings below, are American Telephone & Telegraph Company, its subsidiaries Bell Telephone Laboratories, Inc. and Western Electric Company, Inc., and its former subsidiaries or affiliated companies: The Bell Telephone Company of Pennsylvania; The Chesapeake and Potomac Telephone Company; The Chesapeake and Potomac Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company of West Virginia; Cincinnati Bell Inc.; The Diamond State Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; The Mountain States Telephone and Telegraph Company; New England Telephone and Telegraph Company; New Jersey Bell Telephone Company; New York Telephone Company; Northwestern Bell Telephone Company; The Ohio Bell Telephone Company; Pacific Northwest Bell Telephone Company; The Pacific Telephone and Telegraph Company; Southern Bell Telephone and Telegraph Company; South Central Bell Telephone Company; The Southern New England Telephone Company; Southwestern Bell Telephone Company; and Wisconsin Telephone Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This petition is filed by plaintiffs on behalf of the class certified in five consolidated actions. Petitioners are users of non-AT&T telephone terminal equipment who were required by the defendants American Telephone & Telegraph Co. and its subsidiaries ("AT&T") to lease from AT&T unnecessary interface devices in order to perpetuate AT&T's monopoly of the terminal equipment market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. That court reversed the decision of the district court which had applied collateral estoppel to prevent relitigation of certain liability issues decided by a jury adversely to AT&T in *Litton Systems, Inc.* v.

AT&T Co., No. 76 Civ. 2512 (WCC) (S.D.N.Y.), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984). The Court of Appeals' decision effectively precludes offensive collateral estoppel in the District of Columbia Circuit, contrary to *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979).

OPINIONS BELOW

The opinion of the panel of the Court of Appeals is unofficially reported at 1984-2 Trade Cas. (CCH) ¶ 66,186 and is set forth in the Appendix to this Petition ("App." A). The orders of the Court of Appeals denying the petition for rehearing, with suggestion for rehearing *en banc*, are unreported. App. B. The district court decision granting petitioners' motion for the application of collateral estoppel in accordance with *Parklane* is reported at 566 F. Supp. 296 (1983). App. C.

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on September 11, 1984. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on October 22, 1984. On November 9, 1984, the Court of Appeals granted petitioners' motion for a stay of the mandate. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

A. Preliminary Statement

Antitrust litigation is a costly process in which parties spend millions of dollars in pursuing and defending causes of action which consume substantial judicial resources. In the context of these economic concerns, this Court decided fundamental questions of collateral estoppel in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), and *Parklane*

Hosiery Co. v. *Shore*, 439 U.S. 322 (1979). This Court thereby established the principle that a litigant who was not a party to a prior judgment may nevertheless use that judgment offensively to prevent a defendant from relitigating issues resolved in the earlier proceeding.

Consistent with those decisions, the district court granted petitioners' motion to apply collateral estoppel here to preclude AT&T from relitigating certain liability issues identical to those decided adversely to AT&T by the jury in *Litton Systems, Inc.* v. *AT&T Co.*, No. 76 Civ. 2512 (WCC) (S.D.N.Y.), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984). The Court of Appeals, in reversing the district court's order, erroneously established a new standard for the application of offensive collateral estoppel which directly conflicts with *Parklane* and effectively turns the clock back to the law of collateral estoppel prior to *Blonder-Tongue*.

B. The Litton Proceedings

In June 1976, Litton Systems, Inc. filed its complaint against AT&T in the Southern District of New York alleging that AT&T had violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing and attempting to monopolize the telephone terminal equipment market.[1] AT&T's primary anticompetitive practice was its requirement, instituted by a tariff effective January 1, 1969, that all of its competitors' equipment be attached to the network only through its expensive and unnecessary interface device, which AT&T intended to be an anticompetitive barrier between non-AT&T equipment and the telephone network.

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[1] Telephone terminal equipment consists primarily of key systems, which allow a single telephone to connect from two to 40 other telephones through the use of buttons on the telephone, and private branch exchanges (PBX), which use a central console and a switching mechanism to allow the interconnection of from 40 to several thousand telephones. *See Litton*, *supra*, 700 F.2d at 789, 791.

During the ensuing seven years of litigation with Litton, AT&T exhaustively utilized every conceivable discovery and procedural device in its defense. AT&T spent over $65 million and utilized 3,500 people in its defense.[2] AT&T, Litton and third parties produced millions of documents. AT&T took more than 150 depositions. Over 1,400 pleadings were filed by the parties. Two magistrates and the district court entered over 300 discovery rulings. Every conceivable issue was raised, briefed and argued thoroughly by AT&T, often over and over again.

The trial lasted from January 12, 1981 to the end of June, and is reflected in over 18,000 pages of trial transcript. AT&T clearly had a full opportunity to present its defense, calling 42 witnesses and cross-examining the many witnesses called by Litton. 945 exhibits were received in evidence. Litton proved that AT&T's interface device was not necessary to protect the network from harm, but rather was adopted and maintained by AT&T as a deliberate means of eliminating and impeding competitors to maintain its monopoly of the terminal equipment market. Litton proved that AT&T opposed in bad faith all efforts to replace the interface device with technical equipment standards, by pursuing a course of conduct that included repetitive, baseless claims, misrepresentations, deceit and delay before the FCC.

The evidence before the jury showed that the interface device proved to be a devastating economic barrier to competition. AT&T required each customer using a competitor's equipment to pay it about $6 per month, or $72 a year, to rent an interface device for each telephone line. AT&T also imposed installation charges of about $20 per interface device. A customer using a 100 line PBX system, therefore, paid AT&T about $7200 a year in interface device rentals and $2000 in installation

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[2] The FCC required AT&T to file quarterly reports of its total expenses in the *Litton* case. FCC Form SN 1055. The FCC recently prohibited AT&T from passing on the *Litton* judgment and AT&T's litigation costs to the ratepayers.

charges. These direct costs substantially undermined the ability of competitors to enter the market and resulted in substantial overcharges by AT&T to customers who elected to utilize non-Bell equipment.

The *Litton* jury returned a verdict against AT&T and in favor of Litton, awarding Litton $91,990,000 for damages suffered as a competitor of AT&T, and $268,243 in damages for the interface device charges which Litton was forced to pay to AT&T because it used competitive terminal equipment.

In a comprehensive opinion, the Second Circuit unanimously affirmed the jury verdict that AT&T had monopolized and attempted to monopolize the relevant market, each sub-finding of anticompetitive conduct, and the damage award. It found the evidence "sufficient, both in terms of its weight and from the standpoint of causation," and commended the trial court for its handling of this "complex" and "difficult" case as "a model of judicial technique." *Litton Systems, Inc.* v. *AT&T Co.*, 700 F.2d 785, 790 (1983), *cert. denied*, 104 S. Ct. 984 (1984). After considering each of AT&T's objections, the court held the trial court's instructions and evidentiary rulings were "free from prejudicial error." *Id.* It also found no merit in AT&T's attack on the verdict for Litton as an interface device customer. *Id.* at 819-22.

AT&T's petition for a writ of certiorari focused on the question whether its anticompetitive conduct was protected by the *Noerr-Pennington* doctrine. In response to this Court's invitation, the Solicitor General filed a brief as amicus curiae stating that "the court of appeals' decision is correct, does not conflict with any decision of this Court or of any other court of appeals, and does not raise any issue of clear general importance."[3] This Court denied AT&T's petition for a writ of certiorari.

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[3] Brief for the United States as Amicus Curiae at 7-8, *AT&T Co.* v. *Litton Systems, Inc.*, 104 S. Ct. 63 (1983) ("Solicitor General Br.").

C. The District Court's Application of Collateral Estoppel

Following the jury verdict and judgment thereon in *Litton*, petitioners filed their complaints as class actions alleging that they, as AT&T customers, were similarly forced by AT&T to pay for the installation and lease of the unnecessary interface device because they used competitive terminal equipment; and moved the district court to apply the doctrine of collateral estoppel to certain liability issues. Petitioners argued that they should not be required to relitigate the same issues decided adversely to AT&T in *Litton*. It would be a gross misuse of resources to require a replay of the *Litton* trial in the instant litigation. After months of briefing and almost a full day of oral argument, the district court issued its collateral estoppel ruling on June 27, 1983. App. C. In that opinion, the district court set forth the factual issues which were actually and necessarily litigated in *Litton* and resolved adversely to AT&T. The district court found that the issues resolved by the *Litton* judgment were identical to issues raised by the class plaintiffs and determined that applying collateral estoppel to AT&T would not be unfair. App. C at 37a-41a.

The district court found that AT&T did "not seriously dispute" that it had in fact "fully and vigorously" litigated those issues in *Litton*, not only because of the magnitude of potential liability in that case alone but because of the clear prospect of subsequent suits such as this. App. C at 39a. Moreover, there were "of course, no 'procedural opportunities' available to AT&T in this action which were not available" in *Litton*. *Id.* The district court also held that no decision cited by AT&T as purportedly inconsistent with the *Litton* verdict had the requisite finality, nor was any " 'inconsistent' with either the ultimate facts or the law of *Litton*" so as to undermine confidence in that result. *Id.* at 40a. The district court also rejected AT&T's contention that a second opportunity to litigate the *Litton* issues was required by

"newly discovered evidence", finding that AT&T relied merely on the possibility that such evidence might be found. *Id.* at 40a-41a.

The district court concluded that *Parklane* governed and that AT&T was collaterally estopped from relitigating its liability for unlawful monopolization of the telephone terminal equipment market, leaving proof of damages for trial. App. C at 41a-42a. Under 28 U.S.C. § 1292(b) (1982), the district court certified its order to the Court of Appeals. *Id.* at 34a-35a.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Reversal Of The District Court's Application Of Collateral Estoppel Because Of A Possibility That A Second Jury Might Reach A Different Result On The Same Issues Decided Adversely To AT&T By A Jury In *Litton* Effectively Nullifies This Court's Decisions In *Parklane* And *Blonder-Tongue* In The District of Columbia Circuit

In *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332-33 (1979), this Court held that offensive collateral estoppel should preclude parties from contesting matters that they have had a " 'full and fair' opportunity to litigate" in a prior action. In that case, plaintiff brought a stockholder's class action for alleged violations of the securities laws and moved for partial summary judgment, asserting that Parklane and its co-defendant officers and directors were estopped from relitigating their liability because a prior Securities and Exchange Commission action had been decided against them and affirmed on appeal. The offensive use of collateral estoppel was allowed to protect litigants from the burden of relitigating identical issues previously decided. *Id.* at 326 n.4. This Court held that federal courts have "broad discretion" to determine when plaintiffs may use collateral estoppel offensively against a defendant that has already

litigated the same issues against another party. *Id.* at 331.

Parklane decided the issue of offensive use of collateral estoppel which had been left open by the Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329-30 (1971). In *Blonder-Tongue*, the Court held that "the principle of mutuality of estoppel expressed in *Triplett* v. *Lowell* is today out of place." 402 U.S. at 350. The Court approved "the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases." *Id.* at 328. The Court stated:

> Permitting repeated litigation of the same issues as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Id. at 329 (citations omitted). The Court concluded that "[i]n the end, [the] decision will necessarily rest on the trial courts' sense of justice and equity." *Id.* at 334.

In the instant case, the district court concluded that AT&T had every "incentive" to and did in fact litigate the issues in *Litton* fully and "vigorously" in its home forum. Nor did AT&T contend otherwise. AT&T did not dispute the district court's findings that all of the material issues here are identical to issues determined adversely to AT&T in *Litton*. Finally, the Court of Appeals made no finding that in this litigation AT&T can be afforded procedural opportunities unavailable in *Litton* "that could *readily cause* a different result." *Parklane*,

supra, 439 U.S. at 331 (emphasis added and footnote omitted).

The Court of Appeals, however, reversed the district court's collateral estoppel decision, and denied the issue preclusive effect of the jury verdict affirmed in *Litton*, by substituting an erroneous legal standard for the "full and fair opportunity to litigate" standard of *Parklane*, holding that collateral estoppel cannot apply whenever there is a "possibility" that a second jury might reach a different result. Thus, the core of the decision was the following:

> We must consider *whether it is possible* that the several state regulatory decisions that AT&T has identified could lead a jury in a new trial to reach a different result. Because that *possibility* cannot be ruled out, offensive estoppel was improvidently granted.

App. A at 21a (emphasis added). This holding is squarely at war with *Parklane* and effectively abrogates the doctrine of offensive collateral estoppel in the District of Columbia Circuit.

Under *Parklane*, there must be a substantial likelihood of a different result before estoppel can be denied. Only for clear and compelling reasons "that could readily cause a different result" should issues be repetitively litigated. 439 U.S. at 331.

The mere "possibility" rule created by the Court of Appeals eviscerates the principle that collateral estoppel should be applied "once a court has decided an issue of fact or law necessary to its judgment" to "relieve parties of the cost and vexation of multiple lawsuits [and] conserve judicial resources . . . ." *United States* v. *Mendoza*, 104 S. Ct. 568, 571 (1984).

Indeed, in complex and protracted cases where offensive estoppel is most prudent, the mere "possibility" rule

renders it least likely to be applied. Under the opinion of the Court of Appeals, the more costly, complex and difficult a case is, the more likely it is that the party which had issues previously decided against it will be able to compel relitigation. This cannot be reconciled with the policies of this Court enunciated in *Blonder-Tongue* and *Parklane.*

In applying its erroneous mere "possibility" standard to reverse the district court's collateral estoppel decision, the Court of Appeals referred to a single exhibit, a decision by the New York public service commission, which was excluded from evidence in the five-month *Litton* trial. While the Second Circuit in *Litton* determined that the excluded exhibit was "arguably" probative, the Second Circuit concluded that the exclusion was harmless error. *Litton, supra,* 700 F.2d at 819. The Court of Appeals' contention, however, that this single exhibit is "crucial evidence" conflicts with the Second Circuit's decision that its exclusion was harmless error and, indeed, is contradicted by the Court of Appeals' own finding that "standing by itself, such error might not tip the scale against such estoppel." App. A at 20a. The Court of Appeals here nevertheless determined that there was a "possibility" of a different result from *Litton* based on the exclusion of that one exhibit.

The Court of Appeals, moreover, erroneously speculated that AT&T would have also moved for the admission in *Litton* of other state regulatory decisions, stating:

> AT&T argues that had the trial court admitted this evidence, AT&T would have moved for the admission of other similar state regulatory decisions. To bolster its multiple-decision argument, AT&T has identified to this court several state regulatory decisions whose admission it would move in a new trial.

App. A at 17a. There is nothing in the record to support this finding. At no time did AT&T offer any other state

regulatory decisions during the five-month *Litton* trial. Indeed, when AT&T offered the New York decision, AT&T's counsel was asked by the *Litton* trial judge: "How many states are you going to go into?" AT&T's counsel replied: "Just this one." Litton Tr. at 8351 (App. D at 48a). AT&T never offered any other state decisions in *Litton*, as required by Fed. R. Evid. 103(a)(2), to preserve the point for appeal, and told the trial court that it had no intention of doing so. Nor did AT&T contend on appeal in *Litton* that it intended to offer others.[4]

Moreover, such state decisions have no relevance because the Federal Communications Act of 1934 preempted states from taking any positions inconsistent with the FCC. The assertion by the Court of Appeals that *In re Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), is "of limited significance" because these state regulatory decisions were issued prior to 1976 and "the states may have had—or at least may have reasonably believed that they had—shared jurisdiction over the interconnection of telephone terminal equipment" (App. A at 19a) wholly misconstrues *Telerent*. The *Telerent* court

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[4] None of the state regulatory decisions cited by AT&T and presumably referred to by the Court of Appeals involves the interface devices at issue in *Litton*. Three concerned answering machine interface devices, *Blackwood* v. *Southwestern Bell Tel. Co.*, Cause No. 25195, Order No. 106999 (Okla. Corp. Comm'n 1974); *Glusing* v. *C&P Tel. Co.*, 1974 P.S.C. Md. 377 (Md. Pub. Serv. Comm'n 1974); *In re Application of Allen*, App. No. 29169 (Neb. Ry. Comm'n 1971). One concerned a single line telephone interface device, *Slavin* v. *Southwestern Bell Tel. Co.*, Case No. 17,946 (Mo. Pub. Serv. Comm'n 1975), and one discussed an automatic dialer, *Delzell* v. *Pacific Tel. Co.*, Decision No. 77203, Case Nos. 8917, 8891 (Cal. Pub. Util. Comm'n 1970). The last "decision" simply deferred ruling on standards pending the outcome of FCC proceedings. *Sound, Inc.* v. *Northwestern Bell Tel. Co.*, No. C-5-62 (Iowa Comm. Comm'n 1975).

held that the states had no jurisdiction over telephones used for both interstate and intrastate calls because in the 1934 Federal Communications Act, Congress had preempted the states from taking any positions inconsistent with the FCC.

The Court of Appeals, however, found that a public service commission decision "could shed some light on *AT&T's* beliefs and intentions" in imposing and maintaining its interface device requirement. App. A at 20a (emphasis added). But the Court of Appeals here did not question the Second Circuit's holding that "[t]he gist of Litton's case and the jury's findings is that the interface device was unnecessary and uneconomical and that AT&T at all times knew this was so . . . ." *Litton, supra,* 700 F.2d at 790. Although AT&T had claimed for over 25 years that competitors' equipment posed a greater risk of harm to the network than did equipment supplied by AT&T, in *Litton* it could not prove a single instance in which a competitor's equipment had harmed the network. *Id.* at 798.

AT&T's beliefs and intentions were directly evidenced in *Litton* by dozens of AT&T's internal documents and the testimony of 17 of its top executives and senior engineers. What a public service commission said, based largely on what AT&T told it about network harm, would have been cumulative and of marginal value at best.

In the context of the *Litton* record, the exclusion of a single state public service commission decision—about an interface device not used for PBX and key systems and costing only 8% of what PBX and key system interface devices cost—can hardly be equated with a denial of a full and fair opportunity to litigate. Even if the exhibit were arguably probative, the Court of Appeals erred in characterizing it, without explanation, as "crucial evidence" under *Blonder-Tongue,* 402 U.S. at 333. As in *GAF Corp.* v. *Eastman Kodak Co.,* 519 F. Supp. 1203,

1216 (S.D.N.Y. 1981), the excluded exhibit was of "marginal value" and should not prevent offensive collateral estoppel here.

The Court of Appeals' decision conflicts with a second district court decision which also applied collateral estoppel on the basis of the *Litton* judgment. In *Selectron, Inc.* v. *AT&T Co.*, Nos. 76-965-BE, 83-1261, 74-987, slip op. (D. Or. June 4, 1984) (App. E), the district court granted a motion to preclude relitigation of a number of issues based on the *Litton* judgment. It also rejected AT&T's argument in opposition that the exclusion of the New York public service commission decision in *Litton* deprived AT&T of crucial evidence, stating that the "court's review of *Litton* indicate[d] that AT&T unsuccessfully introduced a substantial amount of evidence" on the issue of its beliefs and intentions "in an attempt to prove the validity of" its interface device requirement. App. E at 70a. The district court concluded:

> The thoroughness of AT&T's arguments on this issue during the *Litton* trial combined with the questionable probative value of the New York PSC decision suggests that it is unlikely that its admission would affect the result of a new trial.

Id. The district court determined that the claimed erroneous exclusion of the New York decision, therefore, did "not warrant retrying the issue concerning AT&T's bad faith filing of the [interface device] tariff." *Id.*

In any litigation there is likely to be some exhibit excluded from evidence which a party will claim might "possibly" cause a second jury in a subsequent litigation to reach a different result. But that is not the test established by this Court for offensive collateral estoppel. Where a party has had a "full and fair" opportunity to litigate, it is not an abuse of the district court's discretion to apply offensive collateral estoppel to bar relitigation of the same issues in another case. The district court

here properly applied the *Parklane* standard and held that to make the application of collateral estoppel unfair AT&T "must . . . proffer evidence which is not only relevant and material to the issues as to which they seek to avoid preclusion, but is also more than conjecturally likely to make a difference in outcome." App. C. at 41a. The mere "possibility" standard established by the Court of Appeals, however, effectively makes it impossible for a district court to ever apply offensive collateral estoppel, a result directly contrary to this Court's decisions in *Parklane* and *Blonder-Tongue.*

II. The Court Of Appeals Erroneously Created An Inconsistent "Determination" Exception To The Application Of Collateral Estoppel Contrary To The Inconsistent "Judgment" Requirement of *Parklane*

In *Parklane*, this Court noted that "allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous *judgments* in favor of the defendant." 439 U.S. at 330 (emphasis added and footnote omitted). The district court below rejected AT&T's contention that the decision of Judge Harold Greene, denying AT&T's motion to dismiss at the close of the government's case in *United States* v. *AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981), was inconsistent with *Litton* and thus precluded application of collateral estoppel under *Parklane*, stating:

> The short answer to the argument is that [that] "decision[]" [is] neither the final judgment[] contemplated by the rule of collateral estoppel nor [is it] "inconsistent" with either the ultimate facts or the law of *Litton.*

App. C at 40a.

The Court of Appeals, however, rather than follow the requirement of *Parklane* regarding the "inconsistent . . .

judgment[]" exception to the application of collateral estoppel, stated that an "inconsistent determination" could preclude offensive estoppel, concluding:

> Because of [an] inconsistency in terminology and because of the absence of any explicit consideration of this issue, we cannot agree with appellees that the Supreme Court held that only inconsistent *judgments* could preclude offensive estoppel. The Court did not address this issue directly and we have no reason to limit the reasoning of the Court to an arbitrary distinction between judgments and other judicial determinations.

App. A at 24a (emphasis in original).

The Court of Appeals then concluded that the Second Circuit in *Litton* and Judge Greene in his denial of AT&T's motion to dismiss at the close of the government case, "applied the same [*Noerr-Pennington*] doctrine to largely the same facts but reached opposite conclusions . . ." and were therefore "inconsistent", barring application of collateral estoppel. App. A at 27a.

The Court of Appeals' holding that "determinations" other than judgments may undermine confidence in a prior judgment contradicts *Parklane*. The requirement of an inconsistent "judgment" or equivalent adjudication is far from an "arbitrary distinction". App. A at 24a. A judgment assures that the purported inconsistency was itself based on a complete, reliable and fairly comparable record. Only then can an inconsistent outcome be deemed an "equally reasonable resolution[] of doubt as to the probative strength of the evidence. . . ." Restatement (Second) of Judgments § 29 comment f at 295 (1982). Judge Greene's opinion was neither a judgment nor even a final ruling on the applicability of the *Noerr-Pennington* defense. Indeed, another panel of the Court of Appeals for the District of Columbia Circuit—disagreeing with the panel here—referred to the incomplete record in the

Government case and the fact that Judge Greene did not even make a final "determination" on the liability of AT&T, noting that he "expressly stated that [his] *observations* were based on incomplete evidence and were not intended to be a final determination on the liability of AT&T." *Southern Pacific Communications Co.* v. *AT&T Co.*, 740 F.2d 1011, 1022 (D.C. Cir. 1984) (emphasis added). The Court of Appeals' decision on this point also conflicts with the decision of another district court in *Selectron, Inc.* v. *AT&T Co., supra*, which rejected this same argument of AT&T as "unpersuasive." App. E at 66a-67a.

Judge Greene's opinion, moreover, is wholly consistent with *Litton*. In denying AT&T's motion to dismiss, Judge Greene held:

> The testimony and the documentary evidence adduced by the government demonstrate that the Bell System has violated the antitrust laws in a number of ways over a lengthy period of time. On the three principal factual issues—whether there has been proof of anti-competitive conduct with respect to the interconnection of customer-owned terminal equipment [the issue here] . . .—the evidence sustains the government's basic contentions . . . .

524 F. Supp. at 1381.

Central findings of the *Litton* jury were that the interface device was an unnecessary economic barrier to competition and that AT&T intentionally delayed providing and installing the devices, findings which Judge Greene also explicitly made.

Judge Greene concluded that the evidence in the government case supported the "government's contentions . . . that the [interface device] requirement was unnecessary", that the cost of the devices "either foreclosed non-Bell manufacturers from the particular equipment market or made it difficult for them to compete", and that inter-

face devices "were often unavailable". 524 F. Supp. at 1349 (footnote omitted). He further concluded that AT&T had recognized that a "certification program was feasible, but . . . nevertheless decided to oppose any liberalization of their interconnection policy . . . out of concern over the effect on their revenues and market position", that AT&T was "unable ever to find empirical support for the proposition that the [interface device] was necessary to prevent actual harm to the telecommunications network", and that AT&T "decided to withhold support from any effort to establish a certification program in order to 'buy time' for internal restructuring so as to enable it to prosper in a competitive market." *Id.* at 1350 (footnotes omitted). Judge Greene denied AT&T's motion to dismiss, finding that "on a factual basis the government's terminal equipment interconnection case presently stands unimpeached." *Id.* at 1351.

The Court of Appeals did not find any inconsistency between *Litton* and Judge Greene's opinion as to the scope of the *Noerr-Pennington* doctrine itself or its sham exception. Indeed, Judge Greene's conclusions that the interface "tariffs were [AT&T's] own creation" (524 F. Supp. at 1350 n.47) and that "AT&T's failure to propose a [standards] program for customer-provided equipment . . . cannot conceivably be construed as petitioning for governmental action" (524 F. Supp. at 1363 n.110) parallel the Second Circuit's conclusion in *Litton* that *Noerr-Pennington* did not apply where "[t]he decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC . . . ." 700 F.2d at 807.

The Court of Appeals, however, erroneously asserted that the "evidence introduced in *Litton* included documents that were the same as, or similar to, those that Judge Greene identified as protected." App. A at 26a. Judge Greene, however, made no determination in his September 11, 1981 opinion that any particular document

was protected, but rather invited AT&T to file a list of the government's contentions which were based on solely legitimate petitioning activity. *United States* v. *AT&T Co.*, 524 F. Supp. at 1363-64 & n.117. Because AT&T agreed to a multi-billion dollar divestiture terminating that litigation shortly after Judge Greene's decision, he never ruled on AT&T's September 28, 1981 request to strike, which the government strongly opposed on October 19, 1981. His opinion contained only preliminary observations in this regard.

Moreover, Judge Greene found that evidence of AT&T's participation in various regulatory proceedings was *admissible*, stating:

> [T]he government is not precluded from using AT&T's participation in various regulatory proceedings to show that defendants were aware of the facts they stated in such proceedings, any inconsistency with positions taken elsewhere, the possible lack of a basis for positions taken elsewhere . . . or the conduct of defendants following or in response to agency or court decisions.

524 F. Supp. at 1363 n.110.

In addition, contrary to the assertion of the Court of Appeals, Judge Greene simply did not apply the law to "largely the same facts". App. A at 27a. The resolution of the *Noerr-Pennington* and sham exception issues in *Litton* rested on a vastly different record. The evidence of sham activities available to the jury in *Litton* was far more extensive than that before Judge Greene on AT&T's motion to dismiss at the end of the Government's case in chief. *See Selectron, Inc.* v. *AT&T Co., supra*, App. E at 66a. Indeed, in AT&T's petition for certiorari in *Litton*, it raised the single issue of the *Noerr-Pennington* defense, asserting that *Litton* conflicted with Judge Greene's ruling. But the Solicitor General's amicus brief concluded that "Judge Greene also determined that

[AT&T's] maintenance of the [interface] tariff . . . was not protected under *Noerr*", that "Judge Greene's interpretation of the sham exception is entirely consistent with the decision of the [Second Circuit]", and, therefore, that "any divergency between" *Litton* and the government case "reflects only the application of consistent principles to the records of two different cases." Solicitor General Br. at 16-17. This Court denied certiorari.

III. Resolution Of The Question Presented Is Of Substantial Importance In The Federal Court System

The decision of the Court of Appeals effectively nullifies the doctrine of offensive collateral estoppel established by this Court in *Parklane*. A litigant should not be permitted to relitigate issues decided adversely to it where it had a "full and fair opportunity" to present its case. In a time of burgeoning federal caseloads, the judicial system can ill afford to relitigate issues already determined in fully and fairly litigated cases on the mere "possibility" that a second jury might reach a different result. As the Court recognized in *Blonder-Tongue*, it is no "longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328.

After a long and costly trial in *Litton*, the jury, by special interrogatory, decided that AT&T had monopolized the terminal equipment market in violation of Section 2 of the Sherman Act. In *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981), as the Solicitor General noted in his brief as amicus curiae in *Litton*, Judge Greene determined "that the United States had made out a prima facie case that maintenance of this [interface] requirement was unlawful under the Sherman Act (524 F. Supp. at 1381)." Solicitor General Br. at 17. Only after over ten months of a bench trial (which was never completed) and the expenditure of $380,000,000 by AT&T in its defense was that case re-

solved by the largest divestiture in antitrust history. *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd summarily sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

In AT&T's petition for certiorari in *Litton*, AT&T stated that the conduct at issue in *Litton* "has been raised in no fewer than 17 pending private treble damage cases." Petition for Writ of Certiorari at 28, *AT&T Co.* v. *Litton Systems, Inc.*, 104 S. Ct. 984 (1984). AT&T recognized the important question of the applicability of collateral estoppel in these cases when it stated:

> [P]laintiffs in several of the pending private cases have already moved for partial summary judgment on the ground that the Second Circuit decision should be treated as collateral estoppel. By granting certiorari and reversing the Second Circuit, this Court can eliminate the litigation and subsequent appeals on collateral estoppel, simplify and provide lawful standards for 17 pending cases, as well as resolve issues fundamental to democratic government.

Id. at 29.

There is no valid reason why petitioners, whose class action complaints mirror the allegations of *Litton*, should be required to expend the substantial sums required to relitigate issues already decided adversely to AT&T after a "full and fair" five-month trial in that case. It is of substantial importance to judicial administration that this Court not allow the Court of Appeals to nullify *Parklane*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 26, 1984

APPENDIX

APPENDIX A

Opinion of Court of Appeals for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1735

JACK FAUCETT ASSOCIATES, INC., *et al.*

v.

AMERICAN TELEPHONE AND TELEGRAPH CO., *et al.*,
Appellants

Appeal from the United States District Court
for the District of Columbia
(Civil Action Nos. 81-01804, 81-02623,
81-02624, 81-02781 and 82-00436)

Argued March 13, 1984

Decided September 11, 1984

George L. Saunders, Jr., with whom *Michael S. Yauch, Stewart A. Block, Ronald S. Flagg, Howard J. Trienens* and *Raymond Brenner* were on the brief, for appellants.

William Simon, with whom *Alan M. Wiseman, Albert O. Cornelison, Jr., Jerry S. Cohen* and *Michael D. Hausfeld*

were on the brief, for appellees. *Robert G. Abrams* also entered an appearance for appellees.

Before: TAMM, MIKVA and STARR, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: We confront today several difficult issues concerning the applicability of offensive collateral estoppel or issue preclusion. The district court invoked offensive estoppel to estop American Telephone and Telegraph Co. (AT&T) from litigating its liability on certain alleged antitrust violations. We review this decision against a background in which some of the concerns normally associated with issue preclusion are heightened. The desire for judicial economy rings loudly since without issue preclusion, a long and difficult trial may ensue. Yet, notions of fairness are also heightened since crucial evidence was erroneously omitted from the prior case and since factors external to that case militate against the use of offensive estoppel.

We conclude that the district court abused its discretion in allowing the plaintiffs to utilize offensive estoppel to preclude any questions concerning the defendants' liability. On the record established and the reasons articulated by the district court, the application of offensive collateral estoppel fell below the minimum safeguards which must be present ere a party can be denied the right to present all of its defenses. Accordingly, we reverse and remand.

I. BACKGROUND

The underlying cause of action in the consolidated cases under review is a class action antitrust suit brought against AT&T and its several operating companies throughout the United States (collectively AT&T). Plaintiffs are seven businesses that, from 1968 through 1978, were required, as a condition to obtaining access to

AT&T's network, to acquire interface devices from AT&T so as to connect customer-provided terminal equipment to the AT&T network.

The interface devices, a common type of which was the "protective connecting arrangement" (PCA), attached to the customer-provided telephone terminal equipment. Broadly speaking, business terminal equipment encompasses two distinct categories. "Key systems" allow a single telephone to connect several other telephones through the use of buttons on the telephones. "Private business exchanges" (PBX) utilize a central console or switchboard to allow the interconnection of numerous lines. *See Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 791 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 989 (1984). Other items of terminal equipment include residential phones, answering devices, dialers, and computer terminals. *See North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1040 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

Plaintiffs represent a class of "all users of telephone terminal equipment who received bills from and made payments to any Bell system company for the installation or rental of interface devices between November 20, 1970 and July 1, 1978." *Larkin General Hospital, Ltd. v. AT&T*, Memorandum and Order at 3 n.1 (D.D.C. June 21, 1983). Plaintiffs allege that the interface device requirement, which AT&T imposed by a tariff filed with the Federal Communications Commission (FCC), violated the Sherman Act, Sections 1 and 2, 15 U.S.C. §§ 1, 2. Plaintiffs allege that by requiring interface devices, AT&T intended to, and did obtain and perpetuate a monopoly in terminal equipment.

A. *Regulatory Background.*

The history of the interface device is lengthy, detailed, and controversial. *See generally Litton Systems, Inc. v.*

AT&T, 700 F.2d 785 (2nd Cir. 1983), *cert. denied*, 104 S. Ct. 989 (1984); *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). For our discussion of issue preclusion, however, a broad framework suffices.

Prior to 1956, AT&T, through a tariff filed with the FCC, prohibited the attachment of all foreign devices to its telephone network. AT&T justified this prohibition as necessary to ensure the safe and effective operation of the national telephone network. Using the same rationale of operational concerns, the FCC, in 1955, prohibited the use of a sound shield that attached to a telephone's mouthpiece. *Hush-A-Phone Corp.*, 20 F.C.C. 391 (1955). Indicating that actual harm to the network was to be the guiding principle, this court voided that FCC decision, finding the *Hush-A-Phone* ruling to be neither just nor reasonable. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956). This case represented the initial erosion of AT&T's absolute bar against foreign attachments. In *Use of the Carterphone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), the FCC, applied the *Hush-A-Phone* rationale and declared unlawful the existing foreign attachment prohibition and ordered AT&T to file new tariffs.

In response to *Carterphone*, AT&T filed the so-called interface tariffs that are a focus of this litigation. In broad terms, the tariffs permitted the attachment of foreign devices to the telephone network so long as any electrical connections were through a PCA or other interface device provided by AT&T or its subsidiaries. The FCC permitted the tariffs to become effective, but did so without "giving any specific approval to the revised tariffs." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968). For several years thereafter, the necessity of requiring the interface device was studied. In 1969, for example, the FCC convened a panel of the National Academy of Sciences to study the prob-

lem. And in May 1971, the FCC formed a "PBX Advisory Committee" to study the feasibility of connections to the network without the interface device. State regulatory commissions also investigated AT&T's interface tariffs. *See, e.g., New York Telephone Co.*, 79 P.U.R.3d 410, 417 (N.Y. Pub. Serv. Comm'n 1969); *Glusing v. C & P Telephone Co.*, 1974 Md. P.S.C. 377 (Md. Pub. Serv. Comm'n).

In 1972, the FCC instituted rulemaking proceedings to address the interconnection issues. During the proceedings the PBX Committee submitted a report that included a model certification program. Under a certification program, terminal equipment that met certain standards could connect to the AT&T network without any interface device. AT&T, whether motivated by a genuine desire to protect its network or by a desire to protect its alleged monopoly, opposed the certification standard by filing comments with the Commission and, allegedly, by taking other steps in opposition. Despite this opposition, the FCC, in late 1975, adopted regulations establishing certification standards. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*. 56 F.C.C.2d 593, 599-613 (1975). Subsequently, the FCC applied its certification regulations to customer-provided terminal equipment. 58 F.C.C.2d 736 (1976). The Commission's order was affirmed on appeal. *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

B. *Other Cases.*

The case *sub judice* does not represent the first time that the courts have had to address these facts. Of special importance to our offensive estoppel analysis are two earlier cases, *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981) (Greene, Harold, J.) (the government's case), and subsequently, *Litton Systems, Inc. v. AT&T*,

700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 989 (1984). We turn to these cases first.

1. *The government case.*

In 1979, the United States filed an antitrust action against AT&T, Western Electric Company, and Bell Telephone Laboratories. The government alleged that AT&T, through a variety of actions including the interface device requirement, had violated the Sherman Act. *See generally Southern Pacific Communications Co. v. AT&T*, No. 83-1864, slip op, at 7-9 (D.C. Cir. July 31, 1984) (reviewing government action). While the case ultimately concluded by a settlement agreement between the government and AT&T, the rulings and record developed prior to that settlement were fully litigated and are highly relevant here. At the close of the government's case-in-chief, the defendants filed a motion to dismiss. Considering only the evidence adduced by the government, the district court, per Judge Harold Greene, largely denied the defendants' motion. *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). The court noted that a decision on a motion to dismiss "is a 'tentative and inclusive ruling on the quantum of plaintiff's proof,' which does not preclude a court from making findings and conclusions at the close of the case that are inconsistent with its prior tentative ruling." *Id.* at 1343. In denying the defendants' motion, however, the court articulated certain conclusions highly relevant to our discussion today.

The government's allegations there concerned, at least in part, the same interconnection policies that are the subject of this case. In addressing those allegations, the court concluded:

> [T]he evidence [submitted by the government] sustains the allegation that defendants have used their local exchange monopolies to foreclose competition in the terminal equipment market by refusing unrea-

> sonably to interconnect equipment not provided by the Bell System, or by unreasonably impeding such interconnection, and that neither the government's interconnection claim nor the subsidiary contentions relating thereto should be dismissed.

524 F. Supp. at 1352. Yet the court also concluded that certain evidence introduced by the government could not be used to establish antitrust liability. Said the court:

> [T]he government also sought to prove that when the FCC finally did adopt a registration program in 1975 . . . defendants . . . filed extensive recommendations for the relaxation of the technical standards which they themselves had originally proposed to the FCC. . . . However, *since this proof directly concerns the positions taken by defendants before the FCC, the Court may not rely upon it as a basis for antitrust liability. See* Part VII, *infra.*

Id. at 1350 n.54 (emphasis added). "Part VII," referenced in the above quote, addressed the reach and affect of the *Noerr-Pennington* doctrine on AT&T's alleged liability.

Under the *Noerr-Pennington* doctrine, the Sherman Act does not reach, in broad terms, "a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal either standing alone or as a part of a broader scheme itself violative of the Sherman Act." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Liability can attach, however, when a party's government-related activities fall within the sham exception to the *Noerr-Pennington* doctrine. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (explaining sham exception to the *Noerr-Pennington* doctrine); *Federal Prescription Serv-*

ice Inc. v. American Pharmaceutical Association, 663 F.2d 253 (D.C. Cir. 1981) (same), *cert. denied*, 455 U.S. 928 (1982).

In applying the *Noerr-Pennington* doctrine, Judge Greene concluded:

> Upon examination of the evidence adduced by the government . . ., the Court holds that, with but one exception, all of the AT&T's "petitioning" activities[110] which defendants claim are to be protected by *Noerr-Pennington* are, in fact, protected by that doctrine.

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[110] Defendants may have tangentially raised the *Noerr-Pennington* defense also with respect to matters which are conceptually wholly outside the scope of the doctrine. The Court's ruling herein therefore does not apply to AT&T's failure to propose a certification program for customer-provided equipment, for such conduct cannot conceivably be construed as petitioning for governmental action. (Of course, evidence of AT&T's position before the FCC in its certification docket no. 19528 does fall within the doctrine. . . .) Likewise, the government is not precluded from using AT&T's participation in various regulatory proceedings to show that defendants were aware of the facts they stated in such proceedings, any inconsistency with positions taken elsewhere, the possible lack of a basis for positions taken elsewhere (e.g. in negotiations with competitors), or the conduct of defendants following or in response to agency or court decision.

524 F. Supp. at 1363 & n.110. The only incident that the court found to be within the sham exception involved a competitor's attempt to construct a nationwide digital network. The court, however, did not strike any specific government contentions under *Noerr-Pennington*, but invited the defendants to submit a list of government contentions to be stricken. 524 F. Supp. at 1364 n.117. Because of the subsequent settlement, the court never ruled on any specific list. *See generally United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd summarily sub. nom. Maryland v. United States*, 103 S. Ct. 1240 (1983).

2. *Litton Systems, Inc. v. AT&T.*

The second decision upon which we focus is *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983). In June 1976, Litton Systems and some of its subsidiaries (collectively referred to as Litton) brought an antitrust action in the United States District Court for the Southern District of New York against AT&T, Western Electric Company, Bell Telephone Laboratories, and several Bell operating companies. Litton, suing as both competitor and customer, alleged that AT&T had monopolized and attempted to monopolize the telephone terminal equipment market by requiring the use of the interface device and by opposing the certification program that would have abolished that requirement.

The *Litton* litigation was lengthy and complex. Pretrial proceedings consumed over four years. Trial began in 1980, ran for more than five months and generated 18,000 pages of testimony and 945 exhibits. The jury ultimately found for Litton, concluding that, *inter alia*, AT&T had filed the interface tariff in bad faith, had intentionally delayed in providing and installing the interface devices, and had opposed certification in bad faith. *See* Special Interrogatories 6a, 6b, and 6c, *infra*, Appendix I. The jury awarded damages in the sum of $92,258,243, before trebling.

On appeal, the Second Circuit affirmed. 700 F.2d 785 (2d Cir. 1983). (By this time, Judge Greene's decision on AT&T's motion to dismiss had issued.) The Second Circuit discussed many issues relevant to the instant case. Significantly, the court, two judges concurring, held that AT&T's actions were not within the ambit of the *Noerr-Pennington* doctrine. *Id.* at 806-09. This conclusion, the court indicated, was required because AT&T was " 'engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.' The decision to impose and

maintain the interface tariff was made in the AT&T boardroom, not at the FCC. . . ." *Id.* at 807. The court thus concluded that AT&T's opposition to certification "embraced much more than merely advocating a position before the FCC." *Id.* at 809. Alternatively, the court, all three judges concurring, held that if *Noerr-Pennington* were applicable, liability attached since AT&T's actions were within the sham exception.

Also relevant to the case *sub judice* was *Litton*'s conclusion that the trial court erred in excluding a 1969 New York State Public Service Commission decision that approved the interface requirement as a reasonable means of protecting the AT&T network from harm.

> We view this evidence as arguably probative of AT&T's position, and find it difficult to justify the exclusion of [the New York State Public Service Commission] decision in light of the admission of the various FCC rulings.

700 F.2d at 819. The court, however, held that in light of the "complicated and extensive trial" the error was harmless. *Id.*

C. *The proceedings in the district court.*

Plaintiffs in the instant case allege that AT&T violated the antitrust laws through its interface device policies, including its filing of the tariff and its opposition to certification. This appeal arises from plaintiffs' motion for the offensive application of issue preclusion. Plaintiffs sought to estop defendants from relitigating certain issues supposedly determined in *Litton.* In a brief ten page memorandum, the district court granted plaintiffs' motion in its entirety and thus found:

1. That the class plaintiffs have standing to sue for damages as customers of defendants.
2. That the relevant product market is the sale and lease of telephone terminal equipment consisting of PBX systems and key telephone systems.

3. That AT&T possessed monopoly power in the relevant market during the period in question.

4. That AT&T had the specific intent to obtain monopoly power in the relevant market during that period.

5. That there was a dangerous probability that AT&T would obtain monopoly power in that relevant market.

6. That AT&T attempted to and did willfully obtain and maintain its monopoly power in the relevant market by anticompetitive or predatory conduct, viz, filing its tariff requiring an interface device in bad faith; opposing certification of telephone terminal equipment in bad faith; and intentionally delaying the provision and installation of interface devices.

7. That AT&T's conduct aforesaid proximately caused injury and damage to the class plaintiffs herein.

8. That the interface device was not necessary to protect AT&T's telephone network from harm, and that any claim to the contrary is baseless.

9. That the *Noerr-Pennington* doctrine is not a defense to the claims of the class plaintiffs herein.

Larkin General Hospital, Ltd. v. AT&T, No. 82-0436, slip op. at 11 (D.D.C. June 21, 1983). This appeal followed.

Subsequent to the district court's action, several other district courts passed on the same or similar issue. *See, e.g., Phonetele, Inc. v. AT&T*, No. CV-74-3566-MML, 1984-1 Trade Cas. (CCH) ¶ 65,921 (C.D. Cal. January 19, 1984) (denying motion for offensive estoppel); *Wrede v. AT&T*, CA No. 83-283-1-MAC (M.D. Ga. May 30, 1984) (denying estoppel on several issues, including the *Noerr-Pennington* defense); *Selecton, Inc. v. AT&T*,

Civ. No. 76-965-BE (D. Ore. June 4, 1984) (allowing offensive estoppel on some issues, including *Noerr-Pennington*, denying offensive estoppel on other issues, including *Litton*'s finding that AT&T had delayed intentionally in providing and installing interface devices, and *Litton*'s findings of standing, injury in fact, and proximate cause). *See also AM/Comm Systems Inc. v. AT&T*, Civ. No. 83-4122, slip op. at 6, 1984-1 Trade Cas. (CCH) ¶ 65,920 (E.D. Pa. February 17, 1984) (denying class certification on basis that it is not enough to prove in the abstract that the PCA requirement violated the antitrust laws; requiring instead proof on a product-by-product basis). Although we, of course, intimate no opinion as to these opinions, we note that none have been as broad as the order we here have under consideration.

II. Analysis

A. *Offensive Collateral Estoppel or Issue Preclusion.*

Under the doctrine of offensive collateral estoppel or issue preclusion, a defendant is precluded from relitigating identical issues that the defendant litigated and lost against another plaintiff. *See, e.g., Southern Pacific Communications Co. v. AT&T*, No. 83-1864, slip op. at 3 n.2 (July 31, 1984). The doctrine is detailed, difficult, and potentially dangerous. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Supreme Court refused to prohibit offensive collateral estoppel altogether, saying instead that "the preferable approach . . . is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." 439 U.S. at 331. Recently, the Court again acknowledged the existence of offensive collateral estoppel, at least against non-governmental defendants. *See United States v. Mendoza*, 104 S. Ct. 568 (1984) (holding that offensive collateral estoppel cannot be used against the government).

Under the judicially-developed doctrine of collateral estoppel, once a court has decided an issue of fact or

> law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. . . . Collateral estoppel . . . serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."

Id. at 571 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Thus, it is beyond peradventure that the doctrine of offensive collateral estoppel or issue preclusion is firmly fixed in the firmament of federal jurisprudence.

Briefly stated, three conditions must be satisfied before a party can use issue preclusion to estop a party from relitigating an identical issue previously decided.

> (1) [T]he issue must have been actually litigated, that is contested by the parties and submitted for determination by the court.
>
> (2) [T]he issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial.
>
> (3) [P]reclusion in the second trial must not work an unfairness.

Otherson v. Department of Justice, INS, 711 F.2d 267, 273 (D.C. Cir. 1983); *see also Nations v. Sun Oil Co. (Delaware)*, 695 F.2d 933, 938 (5th Cir.), *cert. denied*, 104 S. Ct. 239 (1983); *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1039 (9th Cir. 1983); *Deweese v. Town of Palm Beach*, 688 F.2d 731 (11th Cir. 1982); *Oberweis Dairy v. Associated Milk Producers*, 553 F. Supp. 962, 967 (N.D. Ill. 1982); *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1211-12 (S.D.N.Y. 1981).

Where offensive estoppel is involved, the element of "fairness" gains special importance. In *Parklane Hosiery*, the Supreme Court stated: "The general rule should be that in cases where a plaintiff could easily have

joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." 439 U.S. at 331. "Fairness to the defendant" thus is a critical finding necessary for the application of offensive estoppel. "Trial courts should take into account a variety of considerations, all relevant to the ultimate question: Would application of offensive estoppel be unfair to the defendant?" *Carr v. District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980). This notion of fairness reflects the equitable nature of issue preclusion.

> Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it. . . . Its application is controlled by the principles of equity. . . . [F]airness to both parties must be considered when it is applied.

Nations v. Sun Oil Co. (Delaware), 705 F.2d 742, 744-45 (5th Cir. 1983) (on petition for rehearing and suggestion for rehearing en banc), *cert. denied*, 104 S. Ct. 239 (1983); *see also Luben Industries, Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983); *Collins v. Seaboard Coastline R.R. Co.*, 681 F.2d 1333 (11th Cir. 1982); *Deweese v. Town of Palm Beach, supra*; *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170 (5th Cir. 1981) ("As a preliminary matter, we note that considerations of fairness are of great importance in determining when use of offensive collateral estoppel should be permitted."); *Johnson v. United States*, 576 F.2d 606, 614 (5th Cir. 1978) (noting that collateral estoppel must not work an injustice against the party precluded); Annot., 58 L.Ed. 938, 944 (1979) ("The overriding consideration in abandoning a strict application of the doctrine of mutuality of parties, and applying collateral estoppel . . . is fairness to that party . . . .").

In *Parklane Hosiery*, the Court identified four examples in which the application of offensive estoppel would be "unfair". Offensive estoppel should not be applied:

> (1) where the party asserting it easily could have joined in the action upon which reliance is placed;
>
> (2) where the party against whom it is to be applied had no incentive to defend vigorously the first action;
>
> (3) where the second action offers procedural opportunities unavailable in the first action;
>
> (4) where the judgment relied on is inconsistent with other decisions.

Parklane Hosiery, 439 U.S. at 328-31. These examples do not constitute an exhaustive list. *Id.* at 331.

B. *Standard of Review.*

As the Supreme Court indicated in *Parklane Hosiery*, the application of offensive estoppel is within the discretion of the trial judge. 439 U.S. at 322. Thus, in reviewing the district court's decision to apply offensive estoppel, this court is bound by the abuse of discretion standard. *See, e.g., Southern Pacific Communications v. AT&T*, No. 83-1864, slip op. at 10; *Collins v. Seaboard Coastline R.R. Co.*, 681 F.2d 1333 (11th Cir. 1982). That "abuse of discretion" is our standard of review, however, does not require us to turn a blind eye to errors that may have been committed. *See generally Burns v. United States*, 287 U.S. 216, 222-23 (1932); *Coca-Cola Co. v. Tropicana Products*, 690 F.2d 312 (2d Cir. 1982); 2 Fed. Proc. L. Ed. § 3:654 (1981). As one appellate court observed in reviewing a district court's decision to apply offensive estoppel: "[The trial court's] discretion is not unlimited, however. Where there is a significant likelihood of substantial unfairness, application of offensive collateral estoppel constitutes an abuse of discretion." *Deweese v. Town of Palm Beach*, 688 F.2d 731, 734 (11th

Cir. 1982). *See also Collins v. Seaboard Coastline R.R. Co.*, 681 F.2d 1333 (11th Cir. 1982) (court must examine the premises upon which discretion is based).

C. *Discussion.*

The parties have raised numerous arguments. Our review of these arguments is made more difficult than it might otherwise have been by the terseness of the district court's opinion. *Compare Larkin General Hospital, supra* (the opinion under review) *with Oberweis Dairy v. Associated Milk Producers, Inc.*, 553 F. Supp. 962 (N.D. Ill. 1982) *and GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981). Although the decision to grant or deny offensive estoppel is within the district court's discretion, we conclude that in this case, the district court abused that discretion in broadly applying offensive estoppel. As the Fifth Circuit observed: "The doctrines [of res judicata and collateral estoppel] must be used . . . not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation." *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313, 1316 (5th Cir. 1970).

1. *The erroneous exclusion of state regulatory decisions.*

As a corollary to the concept that "fairness" to the defendant must be the touchstone in offensive estoppel cases, issue preclusion cannot be invoked against a party who did not have a "full and fair" opportunity to litigate the issue to be precluded. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 333 (1971). In *Blonder-Tongue Laboratories*, the Court indicated that the "full and fair" opportunity inquiry includes the question of "whether without fault of his own the [party against whom collateral estoppel is to be in-

voked] was deprived of crucial evidence or witnesses in the first litigation." *Id.* at 333. *Cf. Carr v. District of Columbia*, 646 F.2d 599, 606 (D.C. Cir. 1980); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977). Similarly, the Restatement (Second) of Judgments suggests that collateral estoppel should not be applied in situations where important, material evidence can be introduced in the current trial that was unavailable in the previous trial. Restatement (Second) of Judgments § 29, comment j, at 297.

AT&T vigorously argues that it was denied a full and fair opportunity to litigate its liability in *Litton* because the *Litton* trial judge erroneously excluded evidence relating to state regulatory decisions. Specifically, the trial judge prevented AT&T from introducing a 1969 decision of the New York Public Service Commission which had addressed the merits of the interface tariff. *New York Telephone Co.*, 79 P.U.R.3d 410, 417 (1969). AT&T argues that had the trial court admitted this evidence, AT&T would have moved for the admission of other similar state regulatory decisions. To bolster its multiple-decision argument, AT&T has identified to this court several state regulatory decisions whose admission it would move in a new trial. For purposes of this review, we shall treat the trial court's exclusionary ruling as applying, as indeed it would have been applied, to all state regulatory decisions.

The Second Circuit held that this evidence was relevant and that the trial court had erred in excluding it. *Litton Systems v. AT&T*, 700 F.2d at 819. That court, however, concluded that in light of the lengthy and complex trial that had just been completed, the error was harmless. *Id.* AT&T contends that this evidence would demonstrate the reasonableness of AT&T's belief that the interface requirement was in the public interest and might ultimately receive the FCC's approval.

We agree with AT&T that these state regulatory decisions could influence a determination of AT&T's alleged liability. The Second Circuit itself acknowledged that this evidence was "arguably probative of AT&T's position." *Litton Systems v. AT&T*, 700 F.2d at 819. These decisions may be relevant to the reasonableness of the interface device requirement, which, in turn, may be relevant to AT&T's ultimate liability since a finding by a state regulatory authority that the interface tariff is necessary to protect AT&T's network may bolster AT&T's claim that its actions were in the public interest. As the Ninth Circuit stated:

> When the regulated entity assertedly attempts to respond to its duties as a common carrier by filing and implementing an anticompetitive tariff, the antitrust laws do not apply to the tariff without regard to the technical and legal constraints flowing from the regulatory structure. If a defendant can establish that, at the time the various anticompetitive acts alleged . . . were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws.

Phonetele, Inc. v. AT&T, 664 F.2d 716, 737-38 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983); *see also MCI Communications v. AT&T*, 708 F.2d 1081, 1109-10 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983). Recently, we too emphasized the importance of "reasonableness" determinations in private antitrust suits against regulated enterprises such as AT&T. "The 'reasonableness' component of this test requires that AT&T have a reasonable basis in terms of concerns for the public interest that are concrete, articulable, and recognized as legitimate by the appropriate regulatory agencies." *Southern Pacific Communications Co. v. AT&T*, No. 83-1102, slip op. at 57 (D.C. Cir. June 26, 1984).

Appellees argue that these state regulatory decisions are irrelevant to AT&T's alleged liability because of the principles articulated in either *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), or *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). We reject this argument. As a threshold matter, this argument conflicts with the *Litton* holding that the state decisions are relevant to AT&T's liability. More important, neither *Cantor* nor *Telerent* precludes the evidentiary use of state regulatory decisions in the case *sub judice*.

In *Telerent*, the FCC asserted its jurisdiction over the interconnection of customer-provided equipment to telephone terminals. Yet *Telerent*, contrary to appellees' assertion, is of limited significance to our discussion since the regulatory decisions that AT&T seeks to introduce were decided before *Telerent* was issued and finally upheld in the courts. (The Supreme Court denied certiorari in 1976.) Thus, at the time of these state regulatory decisions, the states may have had—or at least may have reasonably believed that they had—shared jurisdiction over the interconnection of telephone terminal equipment. The relevance of these decisions to AT&T's contemporaneous conduct and beliefs is not eviscerated by the FCC's *subsequent* assertion of jurisdiction. Simply, good faith state regulatory decisions are relevant to the reasonableness of AT&T's alleged belief that the interface tariff was in the public interest.

Similarly, *Cantor* does not prohibit the admissibility of these state regulatory decisions since the Supreme Court there held only that a state's approval of a tariff does not automatically confer antitrust immunity on the party filing the tariff. *Cantor* did not exclude the possibility that a regulatory commission's actions nontheless might be some evidence of the reasonableness of a position taken by a regulated industry. *See generally MCI Communica-*

tion v. AT&T, 708 F.2d at 1109-10. Certainly, *Cantor* should not be read, as appellees would have us do, for the propostion that state regulatory decisions are wholly irrelevant to the antitrust defense of a regulated industry.

We are persuaded by AT&T's argument that the existence of this acknowledged error in the presentation of the case to the *Litton* jury is a serious obstacle to the plaintiffs' use of offensive estoppel on the issue of AT&T's liability. While, standing by itself, such error might not tip the scale against such estoppel, when added to the other factors discussed below, the application of offensive estoppel in this case would be unfair. This excluded evidence would bear directly on the *Litton* jury's imposition of liability on AT&T for "filing the interface tariff in bad faith" and for "opposing certification in bad faith." Jury Interrogatories 6a, 6c, *infra*. Moreover, we cannot conclude that this evidence, which arguably could shed some light on AT&T's beliefs and intentions, could not lead to a different conclusion in a new trial on the other interrogatories submitted to the jury. In the reasoning of the Court in *Blonder-Tongue Laboratories*, the defendant, without fault of its own, was deprived of crucial evidence in the first litigation. Thus, the district court acted contrary to the clear directives of that decision, and abused its discretion in permitting offensive estoppel.

Nor do we believe our conclusion to conflict with *Litton*'s holding that the exclusion of this evidence did not constitute prejudicial error. 700 F.2d at 819. The *Litton* court was reviewing a jury trial that already had transpired and that had produced a lengthy and complex record. Armed with this documentation, the Second Circuit could review the record and conclude that the omission of a single state regulatory decision did not constitute prejudicial error—did not affect AT&T's substantial rights in the context of that case. In contrast, our inquiry into the fairness of offensive estoppel is not limited narrowly to a review of a specific record and a spe-

cific jury. We must consider whether it is possible that the several state regulatory decisions that AT&T has identified could lead a jury in a new trial to reach a different result. Because that possibility cannot be ruled out, offensive estoppel was improvidently granted.

More important, the premise underlying the argument that the Second Circuit's "harmless error" conclusion binds our decision today is that the standard for "reversible error" and the standard for "errors precluding offensive estoppel" must be the same. This we decline to hold. Indeed, we have noted approvingly, albeit in dicta, another court's conclusion that "newly discovered evidence, *even if insufficient to justify setting aside a judgment*, may warrant refusal to give the judgment preclusive effect in other actions." *Carr v. District of Columbia*, 646 F.2d 599, 606 n.35 (D.C. Cir. 1980) (emphasis added) (citing *1776 K Street Associates v. United States*, 602 F.2d 354, 358 (Ct. Cl. 1979), *cert. denied*, 447 U.S. 905 (1980)). Similarly, the Restatement (Second) of Judgments bolsters our conclusion that the same standards are not applicable when deciding whether to overturn a jury's verdict and when deciding whether a trial court properly applied offensive estoppel:

> It is unnecessary that the party seeking to avoid preclusion show, as he must in seeking to set aside a judgment, that the evidence could not have been discovered with due diligence; *the question is not whether a prior determination should be set aside but whether it should be treated as conclusive for further purposes.*

Restatement (Second) of Judgments § 29 comment j, at 297 (emphasis added).

Thus, the only issue relevant to our analysis today is whether *Litton* should be treated as conclusive for purposes of applying offensive estoppel in this case. As explained above, the Supreme Court's language in *Blonder-Tongue Laboratories* leaves no room for dispute. Accord-

ingly, we decline to hold that the Second Circuit's conclusion of harmless error mandates the same result here and we reject the argument that merely because the Second Circuit, in the context of reviewing a jury's conclusion, deemed the erroneous exclusion of a state regulatory decision to be harmless error, that we must ignore that error in our analysis of offensive estoppel.

2. *The government suit against AT&T.*

The next issue features the interplay between:

(1) the Supreme Court's observation in *Parklane Hosiery* that offensive estoppel is inappropriate where inconsistent determinations exist;

(2) the *Noerr-Pennington* doctrine as applied in the government suit;

(3) the *Noerr-Pennington* doctrine as applied in *Litton.*

AT&T contends that Judge Greene's opinion represents a determination inconsistent with *Litton* on the *Noerr-Pennington* issue. Following oral argument we asked for and received supplemental briefs on this subject. These briefs, together with the original filings and the opinions themselves, convince us that AT&T's argument has merit and that the district court failed to catch the clear impact of Judge Greene's ruling on this point. We therefore hold that, in light of this inconsistent determination, the district court abused its discretion in granting plaintiffs' motion for offensive estoppel.

The district court's analysis of this issue is, by its own admission, brief. "The short answer to the argument is that those 'decisions' are neither the final judgments contemplated by the rule of collateral estoppel nor are they 'inconsistent' with either the ultimate facts or the law of *Litton.*" *Larkin General Hospital v. AT&T*, slip op. at 9. We disagree with each component of the district court's conclusion regarding Judge Greene's decision.

Underlying the inconsistent determination exception to the doctrine of offensive estoppel is a notion of confidence. The Restatement clearly articulates this rationale:

> *f. Inconsistent prior determinations.* Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather is that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence. That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary.

Restatement (Second) of Judgments § 29 comment f, at 295. *See also Offensive Collateral Estoppel in Asbestos Litigation: Hardy v. Johns-Manville Sales Corp.*, 15 Conn. L.J. 247, 265 (1983) ("Collateral estoppel is, in part, a reflection of confidence in the determination of a prior action. Where another court reaches an inconsistent determination, the confidence in the primary case is undermined."). Significantly, there is no mention of "finality". The only requirement is that the inconsistent determination undermines the court's confidence in the correctness of the prior decision.

Contrary to Jack Faucett's argument, *Parklane Hosiery* does not hold that only inconsistent *judgments* can preclude offensive estoppel. Admittedly, the Court stated that: "Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous *judgments* in favor of the defendant." 439

U.S. at 330 (emphasis added). In applying this test, however, the Court stated that the "judgment in the SEC action was not inconsistent with any previous *decision*." *Id.* at 332 (emphasis added). Moreover, the draft of the Restatement (Second) of Judgments referenced by the Court used the term "inconsistent *determinations*." Restatement (Second) of Judgments § 88(4) (Tent. Draft No. 2, Apr. 15, 1975) (emphasis added). Because of this inconsistency in terminology and because of the absence of any explicit consideration of this issue, we cannot agree with appellees that the Supreme Court held that only inconsistent *judgments* could preclude offensive estoppel. The Court did not address this issue directly and we have no reason to limit the reasoning of the Court to an arbitrary distinction between judgments and other judicial determinations. The rationale for the inconsistency rule is equally pertinent wherever the inconsistency occurs.

We thus hold that the district court erred in concluding that the absence of "finality" alone prevented AT&T from arguing that the government's suit was an inconsistent determination. The court erroneously relied exclusively on the concept of "finality" that is required to utilize a case for offensive estoppel. But the "inconsistent determination" that precludes offensive estoppel need not be "final" in the same sense. It is enough if that inconsistent determination undermines the court's confidence in the earlier decision. By considering nothing beyond the bald label of "finality," the district court therefore abused its discretion. Although offensive estoppel questions are within the district court's discretion, that court must affirmatively exercise that discretion and cannot take refuge in convenient but conclusory terms.

We do not suggest that every utterance by a court should constitute a determination sufficient to constitute an "inconsistent determination." A district court should consider the facts of any given case including, for ex-

ample, the posture of the opinion (i.e., whether it represents an interlocutory motion or a final judgment) and the attention and care that the decision devotes to the issue. Although the precise contours of this test will have to be developed on a case-by-case basis, the district court cannot merely rest on an unsupported statement that the allegedly inconsistent determination lacks "finality."

Turning to this case, the opinion in the government suit is sufficiently definite and firm on the *Noerr-Pennington* issue to trigger the "inconsistent determination" exception to the application of offensive estoppel. Judge Greene held that AT&T's persistent opposition to equipment certification rules in FCC proceedings was protected under the *Noerr-Pennington* doctrine and could not be grist for antitrust claims. While he denied AT&T's motion to dismiss the charges in their entirety, he did strike the government's allegations with prejudice. The result procedurally was the equivalent of a partial summary judgment against the government. That ruling had sufficient elements of substance and finality to qualify as an "inconsistent determination."

If Judge Greene's opinion in that suit treats *Noerr-Pennington* inconsistently with *Litton*'s treatment of the same doctrine, confidence in the *Litton* conclusions as to AT&T's liability would be unwarranted. Although Judge Greene indicated that some of his conclusions could be modified as AT&T presented its case in defense, we doubt that AT&T would have introduced evidence undermining Judge Greene's pro-AT&T rulings. In any event, Judge Greene's opinion specifically and carefully discussed the *Noerr-Pennington* doctrine and its application to AT&T's conduct. Judge Greene found that certain documents and certain positions taken by AT&T were protected by *Noerr-Pennington* and that AT&T's activities, for the most part, did not fall within the sham exception. *See supra* at 7-8 (quoting *United States v. AT&T*, 524

F. Supp. 1350 n.54, 1352, 1363 & n.110, 1364 n.117). Judge Greene explicitly ruled that certain pieces of evidence and types of evidence were protected and invited the parties to submit a list of government contentions to be stricken.

When *Litton*'s treatment of the *Noerr-Pennington* doctrine is juxtaposed with Judge Greene's treatment of the same issue the inconsistencies become evident. In stark contrast to the treatment of *Noerr-Pennington* presented in the government litigation, *Litton* concluded that *Noerr-Pennington* offered AT&T *no* protection. Two of the judges in *Litton* concluded that the doctrine was wholly inapplicable, while all three agreed that if it did apply, AT&T's activities fell within the sham exception. *Litton* identified no protected evidence, and, beyond the sham exception, discussed no other exception to *Noerr-Pennington.* Yet, the evidence introduced in *Litton* included documents that were the same as, or similar to, those that Judge Greene identified as protected. In response, Jack Faucett suggests that the *Litton* court admitted this evidence under one of the exceptions to *Noerr-Pennington* that Judge Greene had identified. For example, it is argued that certain documents were admitted in *Litton* solely to demonstrate AT&T's inconsistent positions, as exception recognized by Judge Greene. There is, however, *nothing* to suggest that the court in *Litton* considered, much less applied, this exception. Alternatively, Jack Faucett suggests that the *Litton* jury did not rely on the documents that Judge Greene would have excluded. Jack Faucett, however, has no basis for this assertion.

Certainly then, the conclusions in *Litton* reveal a different analytical path than that followed by Judge Greene, who found certain documents protected and who concluded that the sham exception was largely inapplicable. This disparity in results demonstrates that these two opinions are inconsistent in their treatment of AT&T

and the *Noerr-Pennington* doctrine. Each court applied the same doctrine to largely the same facts but reached opposite conclusions about the reach of *Noerr-Pennington*. Appellees can gain no comfort from the settlement of the government case, since, as Judge Greene's opinion demonstrates, the *Noerr-Pennington* issue was fiercely contested through the adversarial process. Therefore, we confront the classic case of inconsistent determinations. To use one decision as the basis for offensive estoppel while ignoring the other decision raises the specific concerns about fairness to the defendant that the Supreme Court articulated in *Parklane Hosiery*.

In sum, we hold that the district court abused its discretion in granting plaintiffs' motion for offensive estoppel on issues of AT&T's liability. Central to *Litton*'s determination of AT&T's liability was its discussion of the *Noerr-Pennington* doctrine. Yet, *Litton*'s discussion of *Noerr-Pennington* and Judge Greene's analysis of the same issue in *United States v. AT&T* are inconsistent. Moreover, we cannot conclude with certainty that the jury's finding of AT&T's liability was uninfluenced by evidence that would have been protected under Judge Greene's *Noerr-Pennington* formula. Thus, *Parklane Hosiery* teaches, offensive estoppel should not have been applied to the issue of liability, or to any issue that traces therefrom. We emphasize, however, that we suggest no opinion as to the correctness of either *Noerr-Pennington* analysis, nor as to that doctrine's application to AT&T's activities.

3. *Product market stipulation.*

The district court also held that issue preclusion applied to the definition of the relevant product market. On the basis of *Litton*, the court held that "[t]he relevant product market is the sale and lease of telephone terminal equipment consisting of PBX systems and key telephone systems." *Larkin General Hospital*, slip op. at

10. AT&T argues that issue preclusion was inappropriate because the parties in *Litton* had stipulated as to the relevant product market. We agree.

A prerequisite to the use of issue preclusion is that the issue actually be litigated. As we recently observed: "Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion." *Otherson v. Department of Justice, INS*, 711 F.2d 267, 274 (D.C. Cir. 1983); *see generally id.* and cases cited therein. Because the issue of product market was not litigated in *Litton*, the district court erred in using *Litton* to estop AT&T from litigating this issue.

Jack Faucett points to language in *Otherson* as suggesting a rule that issue preclusion nonetheless is proper when a stipulation merely "helps to shape the record a factfinder will use to determine the truth of a fact." *Id.* at 275. When that language is viewed in its entirety, its inapplicability to this case is evident. Said the court:

> When a stipulation merely helps to shape the record a factfinder will use to determine the truth of a fact, *rather than to establish the truth of the fact itself*, that fact may be preclusively established in a later trial if the other requirements for issue preclusion are met.

Id. (emphasis added). Here, the stipulation in *Litton* established the product market—that is, the stipulation established the truth of the fact itself. Accordingly, the exception indicated in *Otherson* is inapposite to the present litigation.

4. *International delay in installing interface devices.*

The district court also found, as a subsidiary finding to its conclusion that AT&T attempted to and did obtain monopoly power, that AT&T intentionally delayed in pro-

viding and installing the interface devices. *Larkin General Hospital*, slip op. at 11 (finding 6, reproduced *supra* at 11). This conclusion was drawn from *Litton* jury interrogatory 16(b), in which the jury had concluded that AT&T was liable for intentional delay in providing and installing interface devices.

Subsequent to argument we asked for additional briefing on several issues, including the degree to which the evidence underlying interrogatory 16(b) was relevant to the plaintiffs in the instant case. Had the *Litton* jury considered AT&T's allegedly dilatory actions only as regards Litton, then, without some other indicia of similarity between the parties, these plaintiffs could not use offensive estoppel on this issue. Not surprisingly, the parties argue vigorously about the extent that the evidence in *Litton* concerned more than Litton Industries on the installation issue. We need not resolve this factual dispute since the parties will have another day to contest this issue.

We hold that the district court abused its discretion in granting plaintiffs' motion for offensive estoppel on the intentional delay issue without first exploring this evidentiary question. Although the district court may have broad discretion, it cannot use that discretion as a shield against meaningful inquiry into the premises underlying its decisions. Yet we cannot evaluate those premises if the district court does not articulate its analysis more fully than it has in this case. Accordingly, even had the other preconditions for offensive estoppel been met, we would have to reverse and remand this issue to the district court.

III. Conclusion

For the reasons set forth above, we conclude that the district court abused its discretion in granting plaintiffs' broad motion for offensive estoppel. We have considered

the other arguments raised by appellees and find them unpersuasive in the context of this appeal. We pause to emphasize that we intimate no opinion whatsoever on the underlying merits of plaintiffs' allegations or on the applicability *vel non* of any legal theory to the merits.

To remove any source of confusion, we apply our conclusions to the specific findings made by the district court. Findings three through nine, which all trace to *Litton*'s determination of AT&T's liability, must be reversed because the *Litton* trial court erroneously excluded crucial evidence and because *Litton*'s *Noerr-Pennington* analysis is inconsistent with Judge Harold Greene's analysis of the same issue in the government versus AT&T case. Finding six, which incorporates jury interrogatory 16(b), must be remanded for the additional reason that the district court failed to make necessary predicate findings. Finding two, relevant to the product market, must be reversed because it is based on a stipulation. Finding one, which states only that these plaintiffs have standing, was not specifically challenged and thus may stand.

Today's decision should not be read as suggesting a lack of sympathy with the district court's efforts to facilitate the resolution of the numerous private antitrust suits pending against AT&T. Nothing we say today is meant to discourage the pursuit of alternative methods to resolve this fast-running and overflowing stream of litigation. But however strong may be the concerns with judicial expediency, a court cannot ignore the relevant legal principles which, in the context of offensive estoppel, establish certain parameters within which the district court must exercise its discretion. The doctrine of offensive collateral estoppel is too fraught with drumhead potential to allow its application without the specific limitations that the Supreme Court, other courts, and legal scholars have enunciated.

Reversed and remanded.

APPENDIX B

Orders of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing en Banc

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1735

JACK FAUCETT ASSOCIATES, INC., *et al.*

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Appellants

[Filed Oct. 22, 1984]

BEFORE: Tamm, Mikva and Starr, Circuit Judges

ORDER

On consideration of the Petition for Rehearing of Appellees filed October 9, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1735

JACK FAUCETT ASSOCIATES, INC., *et al.*

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Appellants

[Filed Oct. 22, 1984]

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of Appellees has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wright and Scalia did not participate in this order.

APPENDIX C

Opinion of District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1804

JACK FAUCETT ASSOCIATES, INC., *et al.*,
Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Civil Action No. 81-2623

MCKINLEY, SCHMIDTLEIN & MITCHELL, *et al.*,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Civil Action No. 81-2624

COHEN & ANNAND, P.C.,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Civil Action No. 81-2781

JEROS TACKLE COMPANY, INC., *et al.*,
Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Civil Action No. 82-0436

LARKIN GENERAL HOSPITAL, LTD.,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

[Filed Jun. 27, 1983]

MEMORANDUM AND ORDER

These five consolidated class action antitrust cases come before the Court on plaintiffs' motion for offensive application of the doctrine of collateral estoppel to preclude defendants from relitigating certain issues determined by a judgment upon a jury verdict of the United States District Court for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit in the case of *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983) (*"Litton"*). For the reasons set forth below, plaintiffs' motion will be granted. The Court is aware, however, that to do so will have the practical effect of partial summary judgment for plaintiffs, leaving for trial only issues of damages applicable to a class of plaintiffs who have yet to be formally notified of the pendency of the actions. In contemplation of the time and cost associated with class actions generally, and of the fact that if the Court is in error in the preclusive effect it accords to *Litton*, any determination of damages will be premature. Therefore, the Court concludes, in accordance with 28 U.S.C., § 1292(b), that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, and will stay all further proceedings herein for a period of ten (10) days or

until such time as Court of Appeals acts upon a timely application for an appeal hereunder.

Plaintiffs are seven businesses which were required during a 10-year period ending in 1978 to obtain and pay for interface devices or "protective connecting arrangements" ("PCA's") from from defendants American Telephone & Telegraph Company ("AT&T") and its several operating companies throughout the United States ("Bell system") in order to connect telephone terminal equipment they had acquired from non-Bell system suppliers to the AT&T telephone network.[1] They allege that the requirement of the interface device which AT&T imposed by tariff filed with FCC constituted a violation or violations of the Sherman Act, Sections 1 and 2, 15 U.S.C., §§ 1, 2, by which AT&T intended to and did obtain and perpetuate a monopoly in the telephone terminal equipment market.[2] AT&T has consistently insisted that the

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[1] Plaintiffs have been certified pursuant to Fed. R. Civ. P. 23 to represent a class of "all users of telephone terminal equipment who received bills from and made payments to any Bell system company for the installation or rental of interface devices between November 20, 1970 and July 1, 1978," the inclusive dates encompassing the period of limitations to the abandonment of the practice of charging for the interface devices.

[2] In 1968 the FCC permitted AT&T's tariff requiring the use of PCA's with all terminal equipment not manufactured or provided by AT&T to become effective January 1, 1969, *see In re American Telephone & Telegraph Co. "Foreign Attachment" Tariff Revisions*, 15 F.C.C. 2d 605 (1968), expressly withholding formal approval, however, and refusing to rule on its validity until further investigation could be conducted. *Id.* at 610. Six years later, the FCC found that AT&T had failed to prove that PCA's were actually necessary to protect the network from harm and voided the tariff as an "unnecessarily restrictive limitation" and an "unjust and unreasonable discrimination." *In re Proposals for New or Revised Classes of Interstate & Foreign Message Toll Telephone Service (MTS) & Wide Area Telephone Service (WATS)*, 56 F.C.C. 2d 593, 598 (1975). In its stead the FCC determined to formulate a set of standards to which all terminal equipment, no matter the source,

PCA's were a necessary prophylaxis against possible harm to the telephone network from defective or inferior terminal equipment not manufactured by the Bell system.

Plaintiffs represent without contradiction by defendants (and the *Litton* record appears to support them to the extent it is before this Court) that in June, 1976, Litton Systems, Inc., a terminal equipment manufacturer, and two of its subsidiaries sued AT&T, Western Electric Company and Bell Telephone Laboratories, Inc. (AT&T's manufacturing and research subsidiaries, respectively), and seven regional Bell system operating companies in the U.S. District Court for the Southern District of New York alleging identical violations of the Sherman Act in monopolizing and conspiring and attempting to monopolize trade in telephone terminal equipment by imposing an illegal charge to interconnect non-Bell equipment to AT&T's national telephone network. Pretrial proceedings consumed over four years, during which extensive discovery was taken by and of both sides and a comprehensive defense motion for partial summary judgment was denied. 487 F. Supp. 942 (S.D.N.Y. 1980). Trial began in 1980, ran for more than five months, generated 18,000 pages of testimony and 945 exhibits, and concluded with a jury verdict for Litton in January, 1981, for nearly $92 million as a *competitor* and $268,000 as a *customer* of AT&T which the trial court then trebled. Motions for judgment n.o.v. and a new trial were denied, 525 F. Supp. 154 (S.D.N.Y. 1981), and on February 3, 1983, the U.S. Court of Appeals for the Second Circuit unanimously affirmed. 700 F.2d 785 (2d Cir. 1983). Rehearing and rehearing *en banc* were denied, apparently without a dissenting vote, on March 31, 1983.

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would be required to conform, and its decision to do so was sustained on appeal in *North Carolina Utilities Commission* v. *F.C.C.*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977), taking effect in June, 1978.

Plaintiffs here urge that defendants be precluded from relitigating 11 specific issues presented in *Litton* which, they say, determined their own standing as customers to sue, the relevant product market, defendants' monopoly power and their use of that power anticompetitively, causation, damage, and the invalidity of certain affirmative defenses. They say that each of those issues was actually and necessarily determined adversely to defendants in the proceedings which culminated in the Second Circuit's opinion in *Litton*.

The Court finds from a review of that decision that such is the case. Judge Oakes' 89-page opinion for the court, affirming in all respects the verdict and judgment for Litton as both competitor and customer, based upon special interrogatories (see Appendix) answered by the jury upon legally sufficient evidence and in accordance with correct instructions as to the law by the trial court, definitively determines, expressly or by necessary implication, each and every one of those issues upon which plaintiffs would be obliged to prevail again here in order to recover. The Second Circuit said:

> The gist of Litton's case and the jury's findings is that the interface device was unnecessary and uneconomical and that AT&T at all times knew this was so, and that despite clear prior indications from the FCC that the tariff would be set aside as unreasonable and destructive of competition, AT&T nevertheless proposed and fought to maintain the tariff—all in bad faith in order to exclude competition in the terminal equipment market.
>
> • • • •
>
> We have considered all the parties' contentions and have found none requiring reversal. We find that the evidence was sufficient, both in terms of its weight and from the standpoint of causation, to support the damage award and that the district court's

instructions to the jury and evidentiary rulings were free from prejudicial error. 700 F.2d at 790.

The doctrine of collateral estoppel holds that, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana* v. *United States*, 440 U.S. 147, 153 (1979).[3] It may be invoked offensively as well as defensively, i.e., by a plaintiff to foreclose a defendant from litigating an issue it has previously litigated unsuccessfully in an action with another party, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979), unless to do so would be unfair to the defendant. *Carr* v. *District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980). *Compare Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982); *Schneider* v. *Lockheed Aircraft Corp.*, 658 F.2d 835, 852 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 944 (1982). Unfairness depends, *inter alia*, upon whether the defendant had incentive to litigate the issues to be foreclosed fully and vigorously in the earlier action; whether the precluding judgment is inconsistent with others; and whether significant procedural opportunities are available now which were unavailable in the prior forum. *See Parklane Hosiery Co.* v. *Shore*, *supra*, at 330-31. Federal courts are

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[3] AT&T contends that two of the jury's findings—its affirmative answers to special interrogatories inquiring as to whether AT&T's *attempt* at monopoly had proximately caused damage and whether the interface device tariff had been filed in bad faith—were "unnecessary" to its verdict because they were reached upon further deliberation after the initial verdict establishing liability and damages had been returned. But those findings, once reached, supplied alternative grounds for the verdict upon claims necessarily raised by the evidence and deserving of decision if the jury could agree upon them, and were, moreover, affirmed on appeal. 700 F.2d at 803. *See* Restatement (Second) of Judgments, § 27 comment o (1982); *Winters* v. *Lavine*, 574 F.2d 46, 66-69 (2d Cir. 1978).

given broad discretion to determine when offensive collateral estoppel should be applied. *Id.* at 331.[4]

Defendants do not seriously dispute whether AT&T had sufficient incentive to litigate *Litton* fully and vigorously, because it is clear that they did so, incentive or no. Litton sued as both competitor and customer, claiming damages of millions of dollars in lost sales of its competing terminal equipment and hundreds of thousands of dollars in fees paid to AT&T to use its own telephones. The magnitude of potential liability to Litton alone (not to mention the prospect of subsequent suits by just such plaintiffs as these) was foreseen by AT&T from the outset, and it defended accordingly. And there are, of course, no "procedural opportunities" available to AT&T in this action which were not available in New York (where AT&T has its corporate headquarters) in a sister federal court with a comparable jury panel. In sum, there is nothing in the record before this Court to suggest that, if new counsel for AT&T might try the case differently a second time, he would or could also do so more thoroughly than, or would enjoy any procedural advantage denied to, his predecessor.[5]

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[4] One of the purposes the doctrine of defensive collateral estoppel serves—judicial economy—is, as a rule, disserved by its offensive counterpart. *See Parklane Hosiery Co.* v. *Shore, supra,* at 329-30. Thus it may be appropriate to make a threshold inquiry here—although defendants have not suggested it—as to whether plaintiffs might have joined in *Litton. Cf. GAF Corp.* v. *Eastman Kodak Co.,* 519 F.Supp. 1203, 1214-15 (S.D.N.Y. 1981). The Court concludes that it is exceedingly unlikely that plaintiffs here would have been permitted to join their class claims as customers to further complicate what was from its inception primarily a complex competitor's claim; thus, it cannot be said that withholding the benefit of the doctrine from plaintiffs now would be conducive to judicial economy.

[5] AT&T asserts that 16 of its co-defendants here are Bell System operating companies who were *not* parties in *Litton* and cannot, therefore, be estopped by the *Litton* judgment. The Bell System companies who *were* parties in *Litton,* however, were represented

Defendants argue that the result in *Litton* is "inconsistent" with other "decisions" upon the same issues, namely, various decisions the FCC explicating its ruling in *Carterfone*[6] which precipitated the tariff, decisions of several state regulatory agencies, the opinions of two judges of this court in other antitrust proceedings against AT&T,[7] and the report of a panel of scientists as to the danger posed by non-Bell terminal equipment connected directly to the network. The short answer to the argument is that those "decisions" are neither the final judgments contemplated by the rule of collateral estoppel nor are they "inconsistent" with either the ultimate facts or the law of *Litton*.

Defendants' principal contention in attempting to demonstrate the unfairness of denying them a second opportunity to litigate the *Litton* issues is in the nature of newly discovered evidence. In preparing for trial in another case, they say, they have discovered evidence to suggest that the Chief of the FCC's Common Carrier Bureau between 1974-78 (and possibly others on the staff as well) indulged an anti-AT&T bias by preparing recommended decisions for the Commission "which were designed to assist competitors of AT&T and the Department of Justice in pursuing antitrust cases against the Bell system."

(as all are here) by the same counsel and were presented to the jury as a "single entity" in which, "on matters of system-wide importance [such as] competition and interconnection, the decisions were made at AT&T" (which may explain the jury's finding in defendants' favor in *Litton* on the conspiracy charge). *See Int'l Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 380 F.Supp. 976 (M.D.N.C. 1974), *vacated and remanded on other grounds*, 527 F.2d 1162 (4th Cir. 1975). In any case the 16 have proffered no evidence to this Court that they, or any of them, stand in a different relation to AT&T than its co-defendants did in *Litton*.

[6] *In re Use of the Carterfone Device*, 13 F.C.C. 2d 420 (1968).

[7] *United States* v. *AT&T*, 524 F.Supp. 1336 (1981) and *Southern Pacific Communications Co.* v. *AT&T*, 556 F.Supp. 825 (1982).

Assuming without deciding that the showing defendants must make here to avoid collateral estoppel is less than that which would be required of AT&T to obtain relief under Fed. R. Civ. P. 60(b) in *Litton*, *see* Restatement (Second) of Judgments § 29 comment j (1982), they must nevertheless proffer evidence which is not only relevant and material to the issues as to which they seek to avoid preclusion, but is also more than conjecturally likely to make a difference in outcome. *See GAF Corp.* v. *Eastman Kodak Co.*, 519 F. Supp. 1203, 1215 (S.D.N.Y. 1981). What defendants have proffered, however, is nothing more than a possibility that further discovery might reveal some such evidence specifically compromising the FCC's post-*Carterfone* proceedings, not that they have such evidence in hand, and it is doubtful it would be admissible if it exists at all. *See United States* v. *AT&T*, 524 F. Supp. 1381, 1387 (D.D.C. 1981).

For the foregoing reasons, therefore, it is, this 27th day of June, 1983,

ORDERED, that plaintiffs' motion for collateral estoppel is granted; and it is

FURTHER ORDERED, that the following facts are found by the Court to exist as a matter of law for purposes of this case:

1. That the class plaintiffs have standing to sue for damages as customers of defendants.

2. That the relevant product market is the sale and lease of telephone terminal equipment consisting of PBX systems and key telephone systems.

3. That AT&T possessed monopoly power in the relevant market during the period in question.

4. That AT&T had specific intent to obtain monopoly power in the relevant market during that period.

5. That there was a dangerous probability that AT&T would obtain monopoly power in that relevant market.

6. That AT&T attempted to and did willfully obtain and maintain its monopoly power in the relevant market by anticompetitive or predatory conduct, viz, filing its tariff requiring an interface device and bad faith; opposing certification of telephone terminal equipment in bad faith; and intentionally delaying the provision and installation of interface devices.

7. That AT&T's conduct aforesaid proximately caused injury and damage to the class plaintiffs herein.

8. That the interface device was not necessary to protect AT&T's telephone network from harm, and that any claim to the contrary is baseless.

9. That the *Noerr-Pennington* doctrine is not a defense to the claims of the class plaintiffs herein.

IT IS FURTHER ORDERED, that all further proceedings herein are stayed for a period of ten (10) days or until such time as the Court of Appeals acts upon any timely application for an appeal hereunder.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX—SPECIAL INTERROGATORIES

ADDENDUM

Questions To Be Answered By the Jury

Claim 1—Monopolization

1. Did defendants possess monopoly power in a relevant market?

Yes
(Yes or No)

2. If so, did defendants wilfully maintain such monopoly power by predatory or anti-competitive conduct?

Yes
(Yes or No)

3. If so, was such wilful maintenance of monopoly power a proximate cause of injury to plaintiffs?

Yes
(Yes or No)

Claim 2—Attempted monopolization

4. Did defendants have a specific intent to obtain monopoly power in a relevant market?

Yes
(Yes or No)

5. If so, did defendants attempt to obtain such monopoly power by anti-competitive or predatory conduct?

Yes
(Yes or No)

6. If so, was there a dangerous probability that defendants would succeed in obtaining such monopoly power?

Yes
(Yes or No)

7. If so, was such attempt a proximate cause of injury to plaintiffs?

Yes
(Yes or No)

Claim 3—Conspiracy to monopolize

8. Did AT&T and one or more of the Bell companies, acting as separate entities, conspire or agree to monopolize a relevant market?

No
(Yes or No)

9. If so, did these companies have the specific intent to maintain monopoly power in the relevant market?

No
(Yes or No)

10. If so, did any of the conspirators commit any overt acts in furtherance of the conspiracy?

No
(Yes or No)

11. If so, was the conspiracy a proximate cause of injury to plaintiffs?

No
(Yes or No)

Claim 4—Conspiracy in restraint of trade

12. Did AT&T and one or more of the Bell companies, acting as separate entities, conspire or agree to engage in conduct which unreasonably restrained trade?

No
(Yes or No)

13. If so, was any such conduct a proximate cause of injury to plaintiffs?

No
(Yes or No)

14. What amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained to their telephone terminal equipment business as a proximate result of the violation or violations which you have found? $91,900,000

15. If you have found under any one or more of the four claims that the interface device requirement was a violation of the antitrust laws, what amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained by having to pay for the installation and monthly rentals of defendants' interface devices, as a proximate result of such violation? $ 268,243

Explanation of Answers to Questions 2 and/or 5

(Not required if you answered "No" to *both* questions)

16. If your answer to either Question 2 or Question 5 is "Yes," on which of the following alleged practices of defendants have you based your finding of predatory or anticompetitive conduct:

a. Filing of the interface device tariff in bad faith? Yes
(Yes or No)

b. Intentional delay in providing and installing interface devices? Yes
(Yes or No)

c. Opposing certification in bad faith?

Yes
(Yes or No)

d. Intentionally providing unduly expensive, inefficient or unreliable interface devices?

No
(Yes or No)

e. Intentional pricing of PBX and key telephone services below incremental costs?

No
(Yes or No)

f. Discriminating against purchasers of competitive terminal equipment in the price of network service?

No
(Yes or No)

g. Misuse of information obtained through supplying of the interface devices to attempt to cause customers who have indicated their intention to purchase competitive equipment to lease Bell equipment instead?

No
(Yes or No)

h. Bad faith refusal to sell inside wiring at all or on a reasonable basis?

Yes
(Yes or No)

i. Bad faith delay in making cutovers?

Yes
(Yes or No)

APPENDIX D

Excerpt from Trial Transcript of *Litton Systems, Inc.* v. *AT&T Co.*, No. 76 Civ. 2512 (WCC) (S.D.N.Y.)

GOLDSTEIN-DIRECT

* * * *

[8349] (Jury excused)

THE COURT: What are you trying to bring out, Mr. McGrath?

MR. McGRATH: This is what I am trying to bring out, your Honor.

At the time in question both the states and the federal government regulated terminal equipment. Generally, the rates on terminal equipment as such, how much it was going to cost you to have a PBX in your office or a key telephone system in your office, that was regulated by the states.

In addition, when interconnection came in, although the Federal Communications Commission said that an in interstate calling there has to be a coupler—I'm sorry, that there has to be interconnection, at that time there was no decision of any court as to whether the federal government had pre-emption in that area or whether it could only speak as to the interstate tariffs.

The decision that Mr. Simon referred to came a number of years later in the Telerent decision. Instead of just trying to take advantage of that ambiguity, what AT&T did at this point and what the local companies did at this point, they filed [8350] comparable tariffs in all the states and undertook to get those tariffs effective in all the states.

In addition, the tariffs in the states included not just the provision of what network protection criteria was required, but also as the tariffs were amended over time they included the specific rates that somebody would be charged for a coupler. And the coupler rates were always regulated by the states.

In the case of New York, what happened was, there was a proceeding before the New York Commission. There were a lot of interventions. The same kinds of issues we have been discussing in this trial were raised. They were answered to a great extent by Mr. Goldstein and that Commission after that evidentiary hearing held solidly that the tariffs which had been filed were in the public interest.

Now, the point is, your Honor, not that that decision is res judicata or collateral estoppel or anything like that. The point is that we're right at this time at a time when the jurisdiction on these matters is split, this very state has an extensive evidentiary hearing in which it approves these tariffs over the same kind of opposition we're talking about [8351] here and which later was voiced in the Commission.

THE COURT: How many states are you going to go into?

MR. McGRATH: Just this one.

THE COURT: Is there any state where the tariff has been disapproved, that is the interface device requirement?

MR. McGRATH: Not the initial filing. Later on, for instance, the State of California adopted a certification type program in a series of proceedings that were relatively like the Federal Communications Commission proceedings. I don't believe there was any state in which it was rejected. There were some states in which the commissions declined to reject interconnection altogether. They declined to say that the Federal Communications Commission couldn't do what it did.

Our point, right at this time in the state where the headquarters of AT&T is and where one of the principal defendants in this case does business, that Commission after an evidentiary hearing upheld the reasonableness of these tariffs over opposition. That certainly goes to the good faith of the Bell System in adopting the course which they thereafter adopted.

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APPENDIX E

Selectron, Inc. v. *AT&T Co.*,
Nos. 76-965-BE, 83-1261, 74-987,
slip op. (D. Or. June 4, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 76-965-BE
Civil No. 83-1261
Civil No. 74-987

SELECTRON, INC.; LONGFORD INTERCONNECT TEL. CO.; INTERCONNECT NORTHWEST; AMERICAN BUSINESS COMM., INC., REDD CORP.,
Plaintiffs,

vs.

AMERICAN TEL. & TEL. CO.; PACIFIC NORTHWEST BELL INC.; WESTERN ELECTRIC CO., INC.; BELL TEL LABS., INC.,
Defendants.

[Filed June 4, 1984]

OPINION AND ORDER

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BELLONI, Judge

Introduction

This case is a consolidation of three antitrust actions brought against American Telephone and Telegraph Company; Pacific Northwest Bell, Inc.; Western Electric Company, Inc.; and Bell Telephone Laboratories Inc. (Hereinafter AT&T).[1] Plaintiffs compete with AT&T in Oregon and Washington in the terminal telephone equipment market. This market consists of the sale and lease of PBX and key telephone systems.[2] Plaintiffs allege that, among other things, AT&T monopolized the terminal equipment market in violation of section two of the Sherman Act, 15 U.S.C. § 2.

Before me is plaintiff's motion for partial summary judgment to preclude relitigation of certain issues decided adversely to AT&T in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983). Plaintiffs contend that AT&T fully and fairly litigated these issues in *Litton* and should not have a second opportunity to do so in this action.

Background

The Litton and *Selectron* complaints arise from a series of events beginning at least as far back as the FCC rul-

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[1] The original *Selection* case was filed in 1976. Following the ruling in *Phonotele v. AT&T*, 435 F.Supp. 207 (C.D. Cal. 1977), this court dismissed *Selectron* on the grounds that (1) the FCC had exclusive jurisdiction and (2) the Federal Communications Act conferred an implied antitrust immunity. The Ninth Circuit Court of Appeals reversed both cases for reasons stated in *Phonotele Inc. v. AT&T*, 664 F.2d 716 (1981).

[2] Business offices typically employ one or both of these systems. The chief characteristic of the key system is that it enables the user of one phone to connect communications to several other individual telephones by pressing buttons on the base of the phone. A PBX system is similar but operates on a larger scale. A PBX system employs a central console that allows the user to switch communications to as many as several thousand individual telephones.

ing in *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420, *recon. denied*, 14 F.C.C.2d 571 (1968). (*Carterfone*). In *Carterfone*, the FCC struck down an AT&T tariff that prohibited the interconnection of subscriber-owned equipment to the AT&T telephone network. The FCC ruled that the tariff was unjust and unreasonable because it prohibited the interconnection of "harmless as well as harmful" equipment. *Carterfone*, 13 F.C.C. 2d at 423, 424. The FCC invited AT&T to submit new tariffs to replace the ones the FCC found discriminatory. Although the FCC provided AT&T with little guidance as to what should be included in the new tariffs, the FCC did state that AT&T "may specify technical standards if [it wishes]." *Carterfone*, 13 F.C.C. 2d at 426.

The new tariffs that AT&T filed as a result of *Carterfone* allowed the interconnection of subscriber-owned equipment but only with the use of a plate-like connecting device called a "protective connecting arrangement" or PCA.[3] Under the terms of the tariffs, AT&T was to provide, install, and maintain the PCA device at the customer's expense. The FCC accepted the PCA tariffs but withheld specific approval.[4]

Carterfone, at least in theory, gave telephone subscribers the freedom to obtain their telephone equipment

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[3] The PCA device was to serve as a 'network control signaling' device to prevent wrong numbers, false busy signals, and incorrect billings and as a 'connecting arrangement' to enable the connection of private equipment to the AT&T telephone network.

[4] In footnote 39 and the associated text of *United States v. AT&T*, 461 F.Supp. 1314, 1327 (D.D.C. 1978), the court explained the FCC's view of accepting a tariff with and without approval. Since tariffs often become effective without the Commission's "scrutiny or approval, the courts appropriately exercise antitrust jurisdiction. . . . The Commission considers, however, that when it has prescribed or specifically approved a tariff, its judgment must control . . ."

from suppliers of their choice. The PCA tariff operated to reduce this freedom and had the effect of "minimizing the impact of *Carterfone*." *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 933 (9th Cir. 1975).

After acceptance of the PCA tariffs, the FCC began an investigation into their merits. While investigations were being conducted, AT&T's competitors were fighting to repeal the tariffs. The competitors contended that like the pre-*Carterfone* tariffs, the PCA tariffs restricted "harmless as well as harmful" terminal equipment. The competitors asserted that the AT&T telephone system could be protected without the PCA device by requiring that subscriber-owned equipment meet certain technical standards. They contended that a technical standards certification program would not have the competitive disadvantages associated with the PCA requirement. AT&T vigorously opposed the certification program maintaining that such a program would not adequately protect the AT&T telephone system.

The FCC's investigations culminated in a series of reports. *See Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*—First and Second Report and Order, 56 F.C.C.2d 593 (1975); 58 F.C.C.2d 736 (1976). (The latter report relates to PBX and key systems.) In these reports the FCC concluded that the PCA tariffs were unreasonable and unduly discriminatory. *First Report and Order*, at 598. As a consequence, the FCC replaced the PCA tariffs with a technical certification program as recommended earlier by AT&T's competitors. *See* 47 C.F.R. §§ 68.100-.506 (1980). The FCC continued to require the PCA device for terminal equipment not meeting the certification standards.

It was in light of this history that Litton brought its case against AT&T. Litton alleged that AT&T monop-

olized the terminal equipment market in violation of sections one and two of the Sherman Act, 15 U.S.C. §§ 1 and 2.[5]

The *Litton* case was vigorously prosecuted and defended.[6] At the conclusion of trial, the jury found that AT&T monopolized the terminal equipment market; that AT&T committed various anticompetitive acts;[7] and that as a result, Litton sustained injuries in the amount of $91,900,000 as a competitor and $268,243 as a customer of AT&T. 76 Civ. 2512 (S.D.N.Y. 1981). These amounts were, of course, trebled. The court denied AT&T's motion for judgment notwithstanding the verdict and for a new trial. 525 F. Supp. 154 (S.D.N.Y. 1981). The Second Circuit Court of Appeals unanimously affirmed. 700 F.2d 785 (1983). On March 31, 1983, AT&T's requests for rehearing and rehearing en banc were denied. The Supreme Court subsequently denied AT&T's request for certiorari. 52 U.S.L.W. 3534 (Jan. 17, 1984).

As a result of *Litton*, the Selectron plaintiffs, and similarly situated plaintiffs in cases in other jurisdictions, moved for partial summary judgment to foreclose relitigation of issues determined by the *Litton* jury. Two

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[5] Litton's claims of monopolization and anticompetitive conduct were, for the most part, identical to those claims set forth in the *Selectron* complaint.

[6] Pretrial proceedings consumed four and a half years. Trial lasted five months and generated 18,000 pages of testimony and 945 exhibits. Plaintiffs allege that AT&T spent $65,000,000 in defense.

[7] In a special verdict the *Litton* jury found that AT&T possessed monopoly power in the terminal telephone equipment market; AT&T had specific intent to obtain and attempted to obtain such monopoly power; and that AT&T filed the interface tariffs in bad faith, opposed certification in bad faith, intentionally delayed the installation of PCA devices, refused to sell inside wiring in bad faith, and delayed making cutovers in bad faith.

courts have thus far decided motions for partial summary judgment against AT&T.

The first court to decide the motion was the Federal District Court of the District of Columbia in *Jack Faucett Assoc. v. AT&T*, 566 F. Supp. 296 (1983). *Faucett* involved a consolidation of five class action antitrust cases. The plaintiffs were seven businesses that were required to purchase and use PCA devices for the terminal telephone equipment they obtained from non-AT&T suppliers. The trial court in *Faucett* ruled in plaintiff's favor holding that AT&T should be foreclosed from relitigating issues concerning the relevant market; AT&T's monopolization of the market; and AT&T's perpetration of such predatory acts as filing the PCA tariffs in bad faith and opposing the certification program in bad faith. 566 F. Supp at 301.

The second case in which this issue was decided was *Phonotele Inc. v. AT&T*, Civ. 74-3566 (C.D. Cal. Jan. 19, 1984). Unlike in *Faucett*, in *Phonotele* the court denied plaintiff's motion to foreclose the relitigation of issues determined in *Litton*. The reason for the court's denial of the motion was, in part, because the product market in *Litton* differed from the product market in *Phonotele*. Phonotele made and distributed the Phonemaster. The Phonemaster was used in conjunction with PBX and key system equipment for recording messages and diverting calls. Unlike Litton, Phonotele did not sell or lease PBX or key system equipment.

In the instant action, I grant in part and deny in part plaintiff's motion for partial summary judgment to preclude the relitigation of issues determined in *Litton*. Unlike the product market in *Phonotele*, the product market in *Selectron* is identical to the one in Litton. The parties do not contend otherwise. AT&T fully and fairly litigated its case in *Litton*. The *Litton* trial court fully grasped the issues in this case. In fact, the Second

Circuit went so far as to describe the trial court's handling of *Litton* as "a model of judicial technique for handling a serious, complex, and difficult jury trial." 700 F.2d 785, 790. In the following discussion I elaborate on the reasons for my decision.

Discussion

The Collateral Estoppel Doctrine

The purpose of the collateral estoppel doctrine is to save judicial and adversarial resources. *Parklane Hosiery Co. v. Shore*, 439 U.S. 320, 326 (1979). In the last few years several courts have applied the doctrine offensively to preclude the relitigation of issues in major antitrust cases. *See GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp 1203 (S.D.N.Y. 1981); *Argus Inc. v. Eastman Kodak Co.*, 552 F.Supp 589 (S.D.N.Y. 1982); *Oberweis Dairy v. Associated Milk Producers Inc.*, 553 F. *Supp.* 962 (N.D.Ill. 1982); *Jack Faucett Assoc. v. AT&T*, 566 F. Supp. 296 (D.D.C. 1983).

Application of the doctrine is not a matter of right but rather a matter in which the trial judge has broad discretion. *See Parklane Hosiery Co.*, 439 U.S. at 331. In exercising this discretion the trial judge must consider the following prerequisites:

1. The party to be stopped must have been a party or in privity with a party to the prior action;

2. The issues to be estopped must be identical to issues actually litigated and finally determined;

3. The issues to be estopped must have been necessary to the prior judgment;

4. The party to be estopped must have had a full and fair opportunity to litigate the issues in the prior action; and

5. Application of the doctrine must not otherwise be unfair.

See Parklane Hosiery Co., supra; *Blonder-Tongue Laboratories Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971); Restatement (Second) of Judgments §§ 27-29 (1982).

AT&T argues that several of the above prerequisites have not been met especially the fifth one concerning unfairness. In *Parklane* and *Blonder-Tongue* the Supreme Court recognized several instances in which it would be unfair to apply the doctrine. Among the instances mentioned were where: (a) judgments inconsistent with the prior judgment exist; (b) the prior judgment was based upon improper legal standards; (c) the party against whom the doctrine is asserted was, without fault of its own, deprived of crucial evidence in the prior action and; (d) there was a lack of incentive to litigate in the prior action.[8] *See also* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4465. In addition, the Court held that collateral estoppel should be rejected where the party seeking to apply the doctrine could have easily joined in the prior action but instead chose to take a "wait and see" approach on the sidelines.[9] *Parklane*, 439 U.S. at 330.

1. Identity of Parties

Defendants in the instant action were parties in the *Litton* case. AT&T does not contend to the contrary. Thus the first prerequisite for application of the doctrine is fulfilled.

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[8] It is evident that AT&T had every incentive to vigorously litigate its case in *Litton* and did so. This issue is not contested.

[9] AT&T does not contest this issue. I find that the *Selectron* plaintiffs did not take a 'wait and see' approach in the instant action. If *Selectron* had not been subjected to appellate proceedings, it may have been tried prior to *Litton*. *See* note 11, *supra*.

2. Identity of Issues

Monopoly power is the power "to control prices or exclude competition" in a relevant market. *U. S. v. Grinnell*, 384 U.S. 563, 571 (1966). A relevant market is defined in terms of both a product and a geographic market. *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 667 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963). In *Litton*, the jury found that AT&T possessed monopoly power in the terminal equipment product market. AT&T does not contend that this product market differs from the product market in *Selectron*. AT&T does, however, contend that there is a difference in geographic markets. This difference, AT&T asserts, changes the focus of its state action defense in each case and makes issue preclusion inappropriate.

The state action defense that AT&T refers to provides regulated entities with an opportunity to show that their alleged anti-competitive conduct was justified in light of existing federal and state regulatory policies. In this regard, Professors Areeda and Turner state:

> [A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1 P. Areeda & D. Turner, Antitrust Law § 223d (1978); *See also ITT v. General Tel. and Elec.*, 518 F.2d 913, 935-36 (9th Cir. 1975). The Ninth Circuit Court of Appeals recognized the validity of this defense in its order reversing and remanding the trial court's earlier dismissal of *Selectron*.[10] The Ninth Circuit specifically

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[10] See footnote 1, *supra*.

stated that its order "was without prejudice to the defendants renewing their state action defense." CV 76-965 (9th Cir. Sept. 16, 1982).

AT&T admits that it litigated its state action defense in *Litton* but explains that because of the differing geographic markets in *Litton* and *Selectron* the results of that litigation cannot be applied to the instant action. The geographic market in *Litton*, AT&T contends, was national in scope whereas in *Selectron* the geographic market is limited to the states of Oregon and Washington. AT&T argues that the national scope of the *Litton* trial prevented AT&T from focusing its state action defense upon Oregon and Washington. AT&T contends that collaterally estopping the monopoly power issue in the instant action would improperly deprive AT&T of the opportunity to litigate their state action defense with respect to these states.

AT&T's argument is without merit. In accordance with the Ninth Circuit's order in *Selectron*, AT&T was given a full opportunity to try its state action defense in *Litton*. AT&T presented testimony, exhibits, and arguments on this issue.[11] In addition, Judge Connor made express reference to this defense in his instructions.[12]

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[11] Some of AT&T's evidence on this issue related directly to Oregon and Washington state regulatory policies. AT&T not only cross-examined Selectron's president on this issue in the *Litton* trial but in addition, entered into evidence several Oregon Public Utility Commission decisions. *Litton* Exhibits DX 572-1, 572-3, 572-6.

[12] Judge Connor made several references to AT&T's state action defense in his instructions. Among those references include the following:

> In determining whether defendants had monopoly power in the relevant market . . . one factor, among others, for you to consider is the extent of government regulation of certain activities of AT&T and the Bell operating companies, including the fact that these companies submit tariffs to certain regulatory agencies, including the FCC in connection with various

The fact that AT&T did not concentrate exclusively upon Oregon and Washington regulatory policies in presenting its defense does not reduce the integrity of the jury's determination with respect to these states. The problem is analogous to the one faced by the court in *Oberweis Dairy v. Associated Milk Producers*, 553 F. Supp. 962 (N.D.Ill. 1982). In that case the geographic market in the first action involved the entire midwest whereas the geographic market in the subsequent action involved only the city of Chicago. As in the instant action, the defendants in *Oberweis* contended that the determination of monopoly power in the prior action could not be given collateral estoppel effect because the geographic market in that action was significantly larger than the one in *Oberweis*. The court rejected defendant's argument holding that "[i]t is irrelevant that the geographic areas of the two actions differ. . . . What controls is that [the market in the prior action] *included* this action's relevant area." *Oberweis*, 553 F. Supp. at 969 (emphasis in original). Using the same reasoning in *Selectron*, I find that AT&T's litigation of its state action defense in *Litton* on a national level is sufficient to bar relitigation of that defense in *Selectron* with respect to Oregon and Washington.

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aspects of their telecommunication business. The fact that such regulation exists does not by itself mean that defendants did not possess monopoly power. It is for you to determine the practical effect of such regulation upon Bell's asserted ability to control prices and exclude competition.

Bell contends that this government regulation effectively precluded them from possessing the power to control prices or exclude competition. Litton contends that this regulation has no significant impact upon Bell's ability to control prices and exclude competition. You should consider these contentions and the evidence you have seen and heard regarding government regulation as a fact in determining whether the defendants had monopoly power.

Litton Transcript at 18023-18024.

AT&T next argues that preclusion of the monopoly power issue would be inappropriate because while national competitors like Litton were harmed by AT&T's conduct, regional competitors like Selectron benefitted. AT&T provides no support for this argument. AT&T does refer this court to testimony within the *Litton* transcript; however, that testimony indicates only that national competitors suffered to a greater degree than regional competitors. Contrary to AT&T's contention, the testimony does not indicate that regional competitors benefitted from AT&T's practices.

3. Necessity of Issues to the Prior Judgment

The third prerequisite for application of the doctrine is that the issue to be estopped must have been necessary to the judgment in the prior action. *Parklane Hosiery Co.*, 439 U.S. at 326 n.5; *See also American Triticale, Inc. v. NYTCO Services, Inc.*, 664 F.2d 1136, 1147 (9th Cir. 1981). Issues decided unnecessarily are deprived of some of the "assurances of integrity and correctness the judicial process affords to genuinely dispositive issues." 1B Moores Federal Practice ¶ 0.443[5] (2d ed. 1983).

AT&T contends that three of the jury findings [13] were unnecessary to the *Litton* judgment because of the manner in which the jury decided them. After eight days of deliberation, the jury returned with a verdict for Litton. The jury answered all but three questions. Judge Connor resubmitted these questions to the jury for further deliberation. The jury returned thirty minutes later finding for Litton on each of the three questions, but leaving the amount of the verdict unchanged. On appeal, the Second Circuit affirmed the resubmission. 700 F.2d at 803, 804. AT&T argues that because the jury an-

[13] The three jury findings included (1) AT&T's attempted monopolization proximately caused plaintiff's injury; (2) AT&T filed the interface tariffs in bad faith; and (3) AT&T delayed in making equipment cutovers in bad faith.

swered the instructions without changing the amount of the verdict the determination of those issues was not essential to the judgment in *Litton* and cannot, therefore, be given collateral estoppel effect.

Contrary to AT&T's argument I find that these three issues were as necessary to the judgment as the other issues. The fact that the jury returned prematurely without deciding these issues is irrelevant. Upon resubmission of the issues, the jury decided them. These findings provided alternative grounds for support of the judgment. It is a well recognized rule that "an alternative ground upon which a decision is based should be regarded as 'necessary' for purposes of determining whether [a party] is precluded by the principles of *res judicata* or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds." *Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978); *See also Jack Faucett Assoc.*, 566 F. Supp. at 299 n.3.

AT&T next asserts that collateral estoppel would be inappropriate because these three determinations were the result of a jury compromise.[14] AT&T presents no evidence to show this court that the jury verdict was a compromise except for the relatively short interval in which these issues were decided upon resubmission. I find this circumstantial evidence inadequate to base a finding of a jury compromise and therefore reject defendant's argument.

4. Unfairness

Granting collateral estoppel would be inappropriate where to do so would result in unfairness to the party

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[14] The Restatement (Second) Judgments, § 29(5) and comment (g) (1982), warns against giving collateral estoppel effect to an issue which was determined as a result of a jury compromise in the prior action. This would have the effect of extending an imperfection in the first trial to the Second.

being estopped. As mentioned earlier, the Supreme Court in *Parklane* and *Blonder-Tongue* found that such unfairness could occur where there exist one or more prior inconsistent judgments; where the court in the prior action applied improper legal standards; and where a party, without fault of its own, was deprived of crucial evidence in the prior action.

A. The Noerr-Pennington doctrine—erroneous application

AT&T asserts that collateral estoppel of the jury finding that AT&T opposed certification in bad faith would inappropriately foreclose relitigation of its Noerr-Pennington defense. AT&T argues that relitigation of the Noerr-Pennington defense is necessary because the *Litton* trial court's application of the doctrine was in error.

The Noerr-Pennington doctrine is a judicially created exception to the Sherman Act. The doctrine provides antitrust immunity to a party's bona fide attempts to influence legislative, executive, administrative or judicial actions. *See Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Transport v. Trucking Unlimited*, 404 U.S. 508 (1972). When attempting to influence a governmental decision, a party's anticompetitive intent does not make an otherwise legitimate attempt illegal. *Noerr Motors*, 365 U.S. at 138, 139.

The Noerr-Pennington doctrine was created to protect an interested party's participation in our representative form of government. In addition, the doctrine was formed to prevent erosion of the First Amendment right to petition the government. *California Transport*, 404 U.S. at 510-511. Although the doctrine is a cogent defender of these principles, it has its limits. In *Noerr Motors*, 365 U.S. 127 at 144, the Supreme Court held that where a party's attempt to influence government

action is in reality only an attempt to directly interfere with a competitor the conduct falls within the sham exception to the doctrine.

Determining whether a party's attempt to influence the government process was genuine and therefore protected under the doctrine, or was a sham and therefore unprotected, has proven troublesome for courts. The analysis of the sham exception has been described as both imprecise [15] and difficult to employ.[16] Subsequent applications of the doctrine have helped to identify certain types of conduct that suggest a party is abusing the administrative process in an attempt to stifle competition. For instance, in *California Transport*, 404 U.S. at 513, the Court found abusive conduct exists where a party files repetitive and baseless claims against another party in an attempt to intentionally bar that party's access to an administrative agency.[17]

AT&T argues that the court in *Litton* improperly instructed the jury on this matter. However, a review of Judge Connor's instruction in *Litton* indicates that his recitation of the sham exception is in accord with the state of the law on this topic. In instructing the jury, Judge Connor stated:

> [T]here is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a

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[15] *See In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84, 86 (9th Cir. 1982).

[16] *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 513; *Litton Systems Inc. v. AT&T Co.*, 700 F.2d at 807; *United States v. AT&T Co.*, 524 F.Supp. 1336 (D.D.C. 1981).

[17] *See also Clipper Express v. Rocky Mountain Motor Tariff*, 674 F.2d 1252 (9th Cir. 1976); *Franchise Realty, Etc. v. S.F. Local Joint Executive Bd.*, 542 F.2d 1076 (9th Cir. 1977).

> mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies. In considering whether Bell's filing of tariffs or opposition to registration constituted willful maintenance of monopoly power, therefore, you must decide whether or not they fall within the bad faith exception as I have just explained it to you.

Litton Transcript at 18037. Because I find that the *Litton* trial court properly instructed the jury in this matter, I reject AT&T's argument.[18]

AT&T next argues that precluding the relitigation of the Noerr-Pennington doctrine would be improper because application of the doctrine is primarily a question of law.[19] The Ninth Circuit Court of Appeals neatly disposes of this argument in *Clipper Exxpress* by stating that "[w]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact. *Clipper Exxpress v. Rocky Mountain Motor Tariff*, 674 F.2d 1252, 1264 (9th Cir. 1982).

B. The Noerr-Pennington doctrine—inconsistent judgments

AT&T next argues that precluding relitigation of the Noerr-Pennington doctrine would be unfair because the

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[18] *Litton's* application of the doctrine is in accord with the Ninth Circuit's position on this matter. If anything, the Ninth Circuit interprets the sham exception more broadly than other circuits. *See Clipper Exxpress*, supra; *See also In re Airport Car Rental*, 693 F.2d 84 at 86 n.3; *Litton Systems*, 700 F.2d at 811, fn. 38.

[19] See *United States v. Anaconda Co.*, 445 F.Supp. 486 (D.D.C. 1977); *Cf. Carr v. District of Columbia*, 646 F.2d 599 (D.D.C. 1980) ("It is today well accepted that issue preclusion applies to questions of law and law application as well as to questions of fact.").

Litton jury findings are inconsistent with judgments in *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981); and *Southern Pac. Com. Co. v. American Tel. & Tel.*, 556 F. Supp. 825 (D.D.C. 1983).

In *U.S. v. AT&T*, the government brought an action against AT&T alleging that AT&T monopolized the telecommunications market in violation of section two of the Sherman Act, 15 U.S.C. § 2. The case settled during trial shortly after the government presented its case in chief.[20] Just prior to settlement, AT&T moved to dismiss under Fed.R.Civ.P. 41(b) contending that the government presented insufficient evidence to support a verdict. In an interlocutory opinion, Judge Greene ruled against AT&T. In this opinion Judge Greene reviewed AT&T's Noerr-Pennington defense and determined that the defense protected certain evidence concerning AT&T's opposition to certification. AT&T argues that this determination is contrary to the *Litton* judgment.

AT&T's argument is unpersuasive. Judge Greene's opinion can not be considered inconsistent with the *Litton* jury's decision with respect to the Noerr-Pennington doctrine for two reasons. First, the opinion denying AT&T's motion to dismiss was tentative. In his comments preceding the opinion, Judge Greene states that this "is a tentative and inconclusive ruling on the quantum of plaintiff's proof, which does not preclude a court from making findings and conclusions at the close of the case that are inconsistent with [this] ruling." 524 F. Supp. at 1343. Second, Judge Greene's opinion was based upon an incomplete record. Judge Greene did not have significant portions of evidence on the Noerr-Pennington issue that were introduced in *Litton*.[21] Be-

[20] The settlement resulted in the familiar 'AT&T' breakup.

[21] For instance, the government did not introduce testimony of the Chairman of the PBX Advisory Committee indicating intentional delay in the development of a certification program.

cause Judge Greene's comments were based on an incomplete record and admittedly tentative, I do not accord them sufficient weight to preclude application of collateral estoppel in the instant action.

AT&T also contends that the *Litton* judgment is inconsistent with a finding by Judge Richey in *Southern Pac. Com. Co. v. American Tel. & Tel.*, supra. In that case, Judge Richey found that a speech given by former AT&T chairman John deButts, before the FCC announcing AT&T's opposition to certification, was protected by the Noerr-Pennington defense. AT&T contends that, contrary to Judge Richey's decision in *Southern Pac. Com. Co.*, the *Litton* court did not find that John deButts' speech came within the umbrella of the Noerr-Pennington defense. For support, AT&T refers this court to the following statement in *Litton*:

> There was also evidence tending to indicate that AT&T affirmatively misled the FCC . . . . For example, while it opposed certification standards pursuant to the policy announced before NARUC in the deButts speech, AT&T provided the FCC with a study that its own author believed did not prove anything.

700 F.2d at 811. The Second Circuit's statement suggests only that affirmative misrepresentations made by AT&T employees "pursuant to the policy . . . in the deButts speech" were within the sham exception. The statement does not indicate that the deButts speech itself fell within the exception. Contrary to the AT&T assertion, I find no inconsistency between *Litton* and *Southern Pac. Com. Co.*

C. The PCA Tariff—inconsistent judgments

The *Litton* jury found that AT&T filed its PCA tariff in bad faith. AT&T contends that this finding is inconsistent with FCC decisions, state regulatory agency decisions, and a National Academy of Sciences report that

concluded that the PCA tariff provided a legitimate means of protecting the telephone system.

The FCC and State Regulatory Decisions

AT&T first draws the court's attention to five FCC decisions that hold that AT&T's filing of the PCA tariff did not violate the FCC mandate in *Carterfone* which proscribed tariffs that restricted the interconnection of "harmless as well as harmful" equipment. Unlike AT&T, I do not find the FCC decisions to be inconsistent judgments. First, in each case, the FCC's analysis was based only upon technical considerations. Unlike the jury in *Litton*, the FCC was not determining whether for purposes of antitrust liability the tariff conflicted with the *Carterfone* mandate. Second, the FCC determinations were not inconsistent "judgments" as contemplated by the rule in *Parklane Hosiery*. The FCC decisions were not a result of adversarial proceedings with cross-examination and the other accouterments of trial.[22]

AT&T offers the same arguments with respect to various state regulatory decisions. For the reasons advanced above, I reject these arguments.

The National Academy of Sciences Report

After adopting the PCA tariffs, the FCC initiated studies to determine their validity. In doing so the FCC hired certain consulting firms. A report from one consulting firm, Dittbeiner Associates, was entered into evidence during *Litton*. That report recommended the technical standards certification program over the PCA tariffs. Another report from the National Academy of

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[22] The Court notes that AT&T used these decisions throughout the *Litton* trial in an unsuccessful attempt to convince the jury that its tariff was not filed in bad faith. These decisions were used in examining witnesses, marked as exhibits, received into evidence, and read to the jury. Judge Connor specifically referred to them in delivering his instructions to the jury.

Sciences (NAS) concluded that the network could be adequately protected by either the PCA tariff or the certification program. AT&T asserts that the NAS conclusion contradicts the *Litton* finding that the tariff was filed in bad faith. AT&T admits that the NAS report is not a 'judgment' but contends that it should be afforded particular significance since it represents the determination of an expert fact-finding body.

Like the FCC and state regulatory agencies discussed above, the NAS panel did not base its decision on economic and competitive concerns under principles of antitrust law. The issues decided by the NAS panel and the *Litton* jury were altogether different and the results, therefore, cannot be considered inconsistent. Even if the NAS report could be construed as inconsistent, it could not be afforded more weight than it is due. The NAS panel was simply one of several consulting groups hired by the FCC. The panel was neither an administrative fact finding body nor a judicial one.[23]

D. Crucial Evidence

The New York PSC Decision

AT&T argues that precluding the relitigation of issues in *Selectron* would be unfair because crucial evidence was unavailable in or excluded from the *Litton* trial. First, AT&T points to the exclusion in *Litton* of *In Re New York Teleph. Co.*, 79 Pur3d 410 (NY Pub Serv Comm'n 1969) which found that the PCA tariff was reasonable and "absolutely necessary to ensure reliable service." *Id.* at 417. The *Litton* trial court excluded this evidence on relevancy grounds because the New York PSC decision did not involve the same type of PCA device at issue in *Litton* and because the device in the New York PSC decision cost fifty cents per month, whereas

[23] The NAS panel consisted generally of people from outside the telephone industry. Although there were two representatives from AT&T on the panel there were no representativs from terminal equipment manufacturers.

the same device involved in *Litton* cost over $6.00 per month. On appeal, the Second Circuit found that the trial court erred in excluding the New York PSC decision as it was 'arguably probative'. The Second Circuit, however, held that exclusion of the decision was not prejudicial. 700 F.2d at 819.

I find that the erroneous exclusion of the New York PSC decision does not warrant retrying the issue concerning AT&T's bad faith filing of the PCA tariff. This court's review of *Litton* indicates that AT&T unsuccessfully introduced a substantial amount of evidence on this very point in an attempt to prove the validity of the PCA tariff. The thoroughness of AT&T's arguments on this issue during the *Litton* trial combined with the questionable probative value of the New York PSC decision suggests that it is unlikely that it's admission would affect the result of a new trial.

'New' Evidence

AT&T next refers this court to a 16-volume compendum of documents containing 'new' evidence that it asserts would likely change the result of a subsequent trial. Typical of the contents in this compendium are the following: a 1968 video tape of a speech given by prior AT&T executive officers suggesting that the aim of the PCA tariff was to make the telecommunications market more, not less, competitive; handwritten notes by former AT&T executive John deButts to the effect that certification standards would raise costs to the average consumer; comments by state regulatory commissioners in petitions for reconsideration of the 1968 *Carterfone* decision concerning 'harms to the network'; comments by state regulators to the FCC concerning the 1972 National Academy of Sciences report reflecting their opinion that the report was technically sound; testimony by state regulators in *U.S. v. AT&T* concerning economic effects of increased competition; testimony by members of the 1972 National Academy of Sciences panel indicat-

ing that AT&T did not delay the certification program; a technical report obtained in the *Phonotele* litigation showing that the Phone-mate automatic answering service presented a real hazard to the network; and views of the former FCC Chief of Common Carriers Bureau, Walter Hinchman, showing anti-AT&T bias.

The Court in *Blonder-Tongue Labs.* provides that precluding a party from relitigation could result in unfairness if "without fault of its own" that party were deprived of "crucial" evidence in the prior action. 402 U.S. 313, 333 (1971); *See also* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4465, p. 609 (1981). AT&T's evidence fails to meet the criteria set forth in this standard. First, AT&T was not deprived of the evidence 'without fault of its own'. AT&T admits that it had much of this evidence in hand during *Litton* but for various reasons chose not to use it. A quick perusal of the evidence indicates that AT&T had or could have had practically all of the evidence it now lists. Next and more importantly, the evidence is not 'crucial' evidence as might be likely to change the outcome in a new trial. Much of the evidence AT&T refers to in this 16-volume compendium is cumulative of the 18,000 pages of testimony and 945 exhibits previously generated in *Litton.* Other of the evidence is irrelevant or otherwise inadmissible. Because AT&T's evidence is not crucial and because AT&T was not deprived of it in *Litton* 'without fault of its own', I find that no unfairness would result from applying the collateral estopped doctrine in this case.

5. Issues as to which Collateral Estoppel is Denied

AT&T's Refusal to Sell Inside Wiring and
AT&T's Delay in Making Customer
Cutovers and Providing PCA's

The *Litton* jury found that AT&T refused to sell inside wiring in bad faith, delayed in making customer

cutovers in bad faith, and intentionally delayed in providing and installing PCAs. AT&T argues that the jury decided these issues only with regard to Litton and that, therefore, they should not be afforded collateral estoppel effect. Plaintiffs argue to the contrary, contending that these issues were not unique to *Litton* but instead were a part of AT&T's overall scheme of anticompetitive conduct.

In examining these issues the court finds that, contrary to defendant's assertions of uniqueness, the Second Circuit found that this conduct extended not only to *Litton* but to other competitors of AT&T. 700 F.2d at 815. However, it does not necessarily follow that the *Selectron* plaintiffs were among the other competitors affected by this conduct. Unlike AT&T's filing of the PCA tariff and opposing certification, AT&T's refusal to sell inside wiring and intentional delay in providing essential goods and services to Litton and other competitors may not have affected the Selectron plaintiffs. Because of the episodic nature of these issues this court refuses to grant them collateral estoppel effect. *See Starker v. United States*, 602 F.2d 1341, 1348-50 (9th Cir. 1979).

Standing, Injury in Fact and Proximate Cause

Plaintiffs would have this court apply the *Litton* judgment to relieve plaintiffs of the burden of proving their standing to sue, injury in fact, and proximate cause. Proof that each plaintiff suffered economic harm and that the harm was proximately caused by AT&T's unlawful conduct is essential to establish standing and entitlement to damages. *See e.g. Transamerica Computer Co. Inc. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983); *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (9th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). I find it necessary that plaintiff litigate these issues.

For the foregoing reasons, it is, this 4th day of June, 1984,

ORDERED that plaintiff's motion for partial summary judgment is granted in part and denied in part. I grant plaintiff's motion to preclude relitigation of the following issues:

1. AT&T possessed monopoly power in the relevant market (i.e. the Oregon and Washington terminal telephone equipment market).

2. AT&T willfully maintained such monopoly power by predatory or anticompetitive conduct.

3. AT&T had a specific intent to obtain monopoly power in the relevant market.

4. AT&T attempted to obtain such monopoly power by anti-competitive or predatory conduct.

5. There was a dangerous probability that AT&T would succeed in obtaining such monopoly power.

6. AT&T's predatory or anticompetitive conduct included:

a. Filing the interface device tariff in bad faith; and

b. Opposing certification in bad faith.

I deny plaintiff's motion to preclude litigation of issues of standing, injury in fact, and proximate cause. In addition, I deny collateral estopped with respect to the *Litton* jury findings that AT&T:

1. Intentionally delayed in providing and installing interface devices;

2. Refused to sell inside wiring in bad faith; and

3. Delayed in making cutovers in bad faith.

DATED this 4th day of June, 1984.

/s/ John R. Belloni
United States District Judge

Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-842

In The

Supreme Court of the United States

October Term, 1984

JACK FAUCETT ASSOCIATES, INC., METROPHONE, INC., McKINLEY, SCHMIDTLEIN & MITCHELL, COHEN & ANNAND, P.C., JEROS TACKLE, INC., RAMPART BROKERAGE CORP., AND LARKIN GENERAL HOSPITAL, LTD.,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION RESTATED

Petitioners seek to have this Court review the interlocutory decision of the United States Court of Appeals for the District of Columbia Circuit reversing an order of the district court that had determined without trial every liability issue in this case by application of offensive collateral estoppel based upon a judgment in *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 76 Civ. 2512 (WCC) (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984). The judgment in *Litton* imposed antitrust liability upon AT&T on the theory that positions AT&T advocated on issues of telecommunications regulation in public debate and in pleadings before the FCC were not protected by the *Noerr-Pennington* doctrine or were baseless and sham.

The issue presented by the Petition in this case is:

> Whether this Court should review the decision of the Court of Appeals where:
>
> (1) the sole aspect of the Court of Appeals' decision that Petitioners have properly challenged—that offensive collateral estoppel was inappropriate because the trial court in *Litton* erroneously excluded "crucial evidence" that could lead a second jury to reach a different result—is simply an application of well established principles to the facts of this case;
>
> (2) the Question Presented by Petitioners does not raise for the Court's review other independent grounds upon which the Court of Appeals based its determination that offensive collateral estoppel would be inappropriate—namely (a) that the *Litton* judgment is inconsistent with the decision in *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1381 (D.D.C. 1981), dismissing identical antitrust charges against AT&T on the ground that the challenged conduct was protected by the *Noerr-Pennington* doctrine and that the sham exception to that doctrine was inapplicable; and (b) that the scope of the estoppel ordered by the district court exceeded the scope of the issues actually liti-

gated and decided in *Litton*—and those grounds also reflect an application of well-established principles to the facts of this case; and

(3) there are additional grounds, which the Court of Appeals did not reach, which have led three other district courts to hold that application of collateral estoppel based upon *Litton* is inappropriate.

STATEMENT REQUIRED BY RULE 28.1

Respondent American Telephone and Telegraph Company ("AT&T") has no parent company. Respondents AT&T Technologies, Inc. (formerly Western Electric Company, Incorporated) and Bell Telephone Laboratories, Incorporated are wholly-owned subsidiaries of AT&T. In addition to other wholly-owned subsidiaries, AT&T has ownership interests either directly or through wholly-owned subsidiaries in Cincinnati Bell Incorporated; the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; and ShareTech, Inc.

Respondents Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company and Wisconsin Bell Inc. (formerly the Wisconsin Telephone Company) are all wholly-owned subsidiaries of American Information Technologies Corporation and have no subsidiaries. The Ohio Bell Telephone Company is a wholly-owned subsidiary of American Information Technologies Corporation and has ownership interests in The Chillicothe Telephone Company and The Champaign Telephone Company. American Information Technologies Corporation has no parent company. In addition to wholly-owned subsidiaries,* American Information Technologies Corporation has an ownership interest in Northern Information Technology, Inc.

Respondents The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, The Chesapeake and

*Bell Communications Research Corp. is wholly-owned jointly by American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, The Pacific Telesis Group, Southwestern Bell Corporation and U S WEST, Inc., either directly or through wholly-owned subsidiaries.

Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, and New Jersey Bell Telephone Company are all wholly-owned subsidiaries of Bell Atlantic Corporation and have no subsidiaries. Bell Atlantic Corporation has no parent company. In addition to wholly-owned subsidiaries, Bell Atlantic Corporation has an ownership interest in Telecommunication Specialists, Inc.

Respondents South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are wholly-owned subsidiaries of BellSouth Corporation and have no subsidiaries other than wholly-owned subsidiaries. BellSouth Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Respondents New England Telephone and Telegraph Company and New York Telephone Company are wholly-owned subsidiaries of NYNEX Corporation. New York Telephone has no subsidiaries other than wholly-owned subsidiaries and New England Telephone has no subsidiaries. NYNEX Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Respondent Pacific Bell (formerly The Pacific Telephone and Telegraph Company) is a subsidiary of The Pacific Telesis Group and has no subsidiaries other than wholly-owned subsidiaries. The Pacific Telesis Group has no parent company and, other than Pacific Bell, has no subsidiaries other than wholly-owned subsidiaries.

Respondent Southwestern Bell Telephone Company is a wholly-owned subsidiary of Southwestern Bell Corporation and has no ownership interests in any companies other than wholly-owned subsidiaries. Southwestern Bell Corporation has no parent com-

pany and has no subsidiaries other than wholly-owned subsidiaries.

Respondents The Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company, and Northwestern Bell Telephone Company are all wholly-owned subsidiaries of U S WEST, Inc. and have no subsidiaries other than wholly-owned subsidiaries. U S WEST, Inc. has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Respondent The Southern New England Telephone Company ("SNET") has no parent company. In addition to wholly-owned subsidiaries, SNET has an ownership interest in SONECOR Credit Corporation.

Respondent Cincinnati Bell Telephone Co. (formerly Cincinnati Bell Inc.) is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Enterprises Inc. is a wholly-owned subsidiary of Cincinatti Bell Inc. Cincinnati Bell Supply Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 49 percent partner in a joint venture with Anixter Bros., Inc. Cincinnati Bell Cellular Systems Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 46 percent partner in a joint venture with American Information Technologies Corporation.

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No. 84-842

In The

Supreme Court of the United States

October Term, 1984

JACK FAUCETT ASSOCIATES, INC., METROPHONE, INC., McKINLEY, SCHMIDTLEIN & MITCHELL, COHEN & ANNAND, P.C., JEROS TACKLE, INC., RAMPART BROKERAGE CORP., AND LARKIN GENERAL HOSPITAL, LTD.,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Petitioners seek to have this Court review the decision of the Court of Appeals for the District of Columbia Circuit in *Jack Faucett Assoc., Inc.* v. *American Tel. & Tel. Co.*, 744 F.2d 118 (D.C. Cir. 1984) ("*Faucett*"),[1] in which the Court of Appeals, on an interlocutory appeal, reversed an order of the district court that had resolved without trial every liability issue raised in this case by application of offensive collateral estoppel based upon the jury verdict in *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 76 Civ. 2512 (WCC) (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) ("*Litton*"). As will be developed below, this case does not warrant review under the standards set forth in this Court's Rules.

[1]For the convenience of the Court, this Opposition will refer to the slip opinion of the decision contained in Petitioners' Appendix A.

COUNTERSTATEMENT OF THE CASE

Petitioners' complaints seek to recover treble the amount of all charges paid to Respondents from 1970 through 1978 for protective connecting arrangements ("PCAs") required under tariffs on file with the FCC and with state regulatory commissions all over the United States for interconnection of customer-provided key telephone systems and private branch exchanges ("PBXs") with the telephone network. The theory of these complaints is that the tariff requirement for a PCA was filed and maintained by Respondents wholly without justification, in bad faith, for anticompetitive purposes. In order to understand these allegations and the issues raised by the instant Petition, a review of the regulatory history of practices in the telephone industry pertaining to the use and interconnection of customer-provided equipment is helpful.

A. The Regulatory Background

From the very beginning of the telephone industry in the 19th century, telephone service was provided in this country on a complete end-to-end basis with the telephone companies owning and maintaining all of the equipment and facilities necessary to provide telephone service. Telephone instruments—the telephone set, key telephone systems and PBXs—were viewed by regulatory authorities as part of the "telephone network" itself and no telephone user was permitted to substitute his own equipment for that provided by the telephone companies.[2]

In addition to prohibiting substitutions of telephone company equipment, the telephone companies historically prohibited the attachment of any devices to the telephone instrument. This "for-

[2]Numerous state regulatory cases upheld the prohibition against customer substitution of telephone-company provided equipment. *See, e.g., Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363 (Minn. R.R. & Whse Comm'n 1965), *aff'd*, 70 P.U.R.3d 97 (Minn. Dist. Ct. 1966); *City of Los Angeles* v. *Southern California Tel. Co.*, 2 P.U.R. (n.s.) 247, 249 (Cal. R.R. Comm'n 1933).

eign attachment" prohibition was modified over time by administrative and judicial decisions holding, on a case-by-case basis, that a telephone user could attach certain harmless devices such as a plastic cup to the telephone instrument.[3] Most of these approved attachments were mechanically or acoustically attached. In the few instances that regulatory agencies approved attachments that were electrically connected to the network, the regulatory agencies required that the connection be made through a PCA that was owned, installed and maintained by the local telephone company.[4]

In *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), the FCC, abandoning the former case-by-case analysis of attachments, declared that the general foreign attachment prohibition in AT&T's interstate tariffs was unlawful, and ordered AT&T to file new tariffs that would permit the attachment of "harmless" devices. The scope of the initial *Carterfone* decision was clarified in subsequent FCC orders holding that the *Carterfone* decision did not disturb the existing end-to-end nature of telephone service. It dealt only with *attachments* to the telephone network, not *replacements* of integral parts of that network such as telephone sets, key telephone systems and PBXs;[5] and even with respect to attachments, the decision was not intended to preclude the telephone companies

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[3]*See, e.g., Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956), *on remand*, 22 F.C.C. 112 (1957); *Jordaphone Corp.* v. *American Tel. & Tel. Co.*, 18 F.C.C. 644 (1954).

[4]*Use of Recording Devices in Connection with Telephone Service*, 11 F.C.C. 1033, 1048-49 (1947) (prescribing the use of "adequate connecting arrangements" designed "to protect against impairment of the telephone service . . . [or] harmful voltages or currents which might be injurious to person or plant").

[5]*Carterfone*, 14 F.C.C.2d 571, 572 (1968) (decision on reconsideration); *AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), *recon. denied*, 18 F.C.C.2d 871, 872 (1969); *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 541 (1972).

from taking reasonable efforts to protect the integrity of service.[6]

In compliance with the *Carterfone* decision, AT&T filed the revised tariffs that are the focus of Petitioners' complaints. These "post-*Carterfone*" tariffs were filed with the FCC and state regulatory agencies in late 1968. The revised tariffs went well beyond the requirements of the *Carterfone* decision. They permitted connection to the telephone network of any device a telephone user might desire, so long as any direct electrical connection was made through a PCA—the same approach that the FCC itself had previously prescribed for such attachments from 1947 onward. Moreover, AT&T undertook in the post-*Carterfone* tariffs to redefine the telephone network to terminate in a network control signalling unit (NCSU) to be incorporated within the PCA.[7] The tariffs thus permitted any telephone user, not only to *attach* his own devices to his Bell System telephone set, but also, for the first time, to *substitute* behind the PCA his own telephone set, PBX or key telephone system.

Several petitions to reject were filed in response to these post-*Carterfone* tariffs. Based upon an informal investigation of the tariffs by the FCC's Common Carrier Bureau, the FCC permitted the tariffs to go into effect without invoking the statutory suspension period and without initiating a formal investigation. *AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968). In so doing, the Commission expressly and unequivocally rejected the principal objection to the tariffs—that

[6] *Carterfone*, 13 F.C.C.2d at 424, 426 (inviting AT&T to "submit new tariffs which will protect the telephone system against harmful devices").

[7] Network control signalling controls the operation of switching machines in the telecommunications network. Thus, network control signals initiate a call, dial the desired number, ring the called station, complete the connection to the called station, notify busy conditions, disconnect when the conversation is finished, and bill for the call. *See AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 607 (1968).

is, the claim that the carrier-provided PCA requirement was a violation of the *Carterfone* decision itself. On this point the Commission stated (*id.* at 609-10):

> "We believe that this particular objection is based upon a misconstruction of what we decided in *Carterfone*. We were concerned in that case with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals or systems with the message toll telephone system of the telephone companies. As we have heretofore stated, *this telephone system includes the telephone instrument which performs the network control signaling functions* for message toll telephone service. We were therefore concerned with what could be connected or attached to this telephone system. *Our decision in Carterfone does not hold that a customer may substitute his own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipment) for that furnished by the telephone company* in providing message toll telephone service as that service is defined in the tariff. *Our decision dealt with interconnections and not replacements of any part of the telephone system.*" (Emphasis supplied.)

During the first four years following *Carterfone*, the FCC consistently repeated this finding and, on at least five separate occasions, expressly held that the post-*Carterfone* tariffs did not violate the *Carterfone* decision.[8]

After permitting the post-*Carterfone* tariffs to become effective, the FCC also began considering—albeit with deliberation—whether it should move beyond *Carterfone* to some more unrestricted form of interconnection or even to a redefinition of the basic telephone network. In 1969, the FCC convened a panel of the National Academy of Sciences to study the problem, resulting

[8] *AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), *recon. denied*, 18 F.C.C.2d 871, 872 (1969); *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 541 (1972) ("We have already expressly ruled that the tariff requirement that the carrier be the sole supplier of the NCSU . . . does not violate *Carterfone*"); *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 206 (1974); *Mebane Home Telephone Co.*, 53 F.C.C.2d 473, 476 (1975).

in a 1970 report which concluded that the post-*Carterfone* tariffs were reasonable and that any program involving certification of equipment, which would replace the existing hardware protection, would have to be extremely thorough and probably very expensive;[9] in 1971, the FCC established an Advisory Committee of industry representatives to work out standards for a certification program; and in 1972, it established FCC Docket 19528 and convened a Joint Board of federal and state regulators under 47 U.S.C. §410 to study the whole question of equipment interconnection.[10]

Meanwhile, several of the state regulatory commissions instituted their own investigations of the post-*Carterfone* tariffs. These investigations generally resulted in findings that the post-*Carterfone* tariffs were reasonable and appropriate. For example, in July 1969 the New York Public Service Commission, after an evidentiary hearing, found that the PCA for customer-provided equipment was "absolutely necessary" to protect against the hazards to telephone company equipment and personnel and the degradation of service to other customers that can result from interconnection of customer-provided equipment. *New York Tel. Co.*, 79 P.U.R.3d 410, 417 (N.Y. Pub. Serv. Comm'n 1969). More than a dozen regulatory decisions from other States are in full accord with this New York decision finding that the PCA was a reasonable method of protecting the network from harm.[11]

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[9] Computer Science and Engineering Board of the National Academy of Sciences, *Technical Analysis of Common Carrier/User Interconnections Area* (June 10, 1970).

[10] *Interstate and Foreign MTS and WATS* (Docket 19528), 35 F.C.C.2d 539 (1972).

[11] *See, e.g., Slavin* v. *Southwestern Bell Tel. Co.*, Case No. 17,946, p. 18 (Mo. Pub. Serv. Comm'n Feb. 26, 1975); *Glusing* v. *C & P Tel. Co.*, 1974 Md. P.S.C. 377, 385, 386 (Md. Pub. Serv. Comm'n 1974); *Blackwood* v. *Southwestern Bell Tel. Co.*, Cause No. 25195, Order No. 106999 (Okla. Corp. Comm'n August 8, 1974) and Referee's Report (June 20, 1974); *Approval of South Central Bell Tel. Co. General Exchange Tariff Revisions*, Docket No. U-5132 (Tenn. Pub. Serv. Comm'n Jan. 30, 1969); *Sound, Inc.* v. *Northwestern Bell Tel. Co.*, Docket No. C-5-62 (Iowa State Comm. Comm'n July 23, 1975), *recon. denied*,

(Footnote continued on following page)

While the States were endorsing the need for network protection, the whole question of certification of terminal equipment as a possible alternative became a very controversial economic and political issue. Many state regulators saw certification, and even the post-*Carterfone* tariffs, as a threat to the existing rate structure for telephone service—and ultimately to the principle of universal telephone service—in their respective States. The States feared that the widespread use of customer-provided terminal equipment, particularly PBXs and key telephone systems which were tariffed in many states at premium rates to subsidize local residential telephone service,[12] would reduce the contribution made by terminal equipment rentals to local telephone company operating revenues and result in increases in local and intrastate telephone rates, detrimental to the goals of low-cost universal telephone service. They opposed liberalized interconnection unless and until a way was found to accommodate customer-owned terminal equipment with the maintenance of the existing rate structure for basic telephone service.[13] Thus they

(Footnote continued from previous page)
(Sept. 9, 1975); *Michigan Bell Tel. Co.*, Case Nos. U-3327, U-3492 (Mich. Pub. Serv. Comm'n Feb. 16, 1970); *Hawaiian Tel. Co.*, Decision and Order No. 2769, Docket No. 1865 (Haw. Pub. Utils Comm'n June 16, 1971); *Delzell* v. *Pacific Tel. & Tel. Co.*, Case Nos. 8917 and 8991, Decision No. 77203 (Cal. Pub. Utils Comm'n May 12, 1970); *Associated Communications Serv.* v. *Pacific Tel. & Tel. Co.*, Decision No. 81159, Case Nos. 9411, 9414, 9417 (Cal. Pub. Utils Comm'n Mar. 13, 1973); *Petition of Cassella*, No. 3776 (Vt. Pub. Serv. Bd Sept. 23, 1974); *Application of August H. Allen for Exemption from Tariff of Northwestern Bell Tel. Co.*, App. No. 29169 (Neb. Ry. Comm'n Dec. 20, 1971).

[12]*See, e.g., GSA* v. *New York Tel. Co.*, 63 P.U.R.3d 451, 462-63 (N.Y. Pub. Serv. Comm'n 1965); *General Tel. Co.*, 80 P.U.R.3d 2, 74-76 (Cal. Pub. Utils Comm'n 1969).

[13]These concerns were expressed most strongly by the National Association of Regulatory Utility Commissioners ("NARUC") in proceedings before the FCC itself. For example, in early 1972, the NARUC Subcommittee on Communication Interconnection told the FCC it opposed certification because it would "benefit a very affluent class of users" with "the general public . . . forced to shoulder a greater

(Footnote continued on following page)

filed comments opposing certification in FCC Docket 19528, sought and obtained some congressional support for their position, introduced legislation, and in various ways urged the telephone companies to resist certification until the economic concerns of the state regulators were considered.

After some uncertainty and debate within the Bell System on the position AT&T should take with regard to the certification issue in Docket 19528, AT&T, in March 1973, adopted the same position as the States and determined to oppose certification until the ramifications of increased competition in telecommunications could be fully examined. This position was first publicly announced by AT&T's Chairman, John deButts, at the AT&T annual shareholders meeting in April 1973. In September 1973, Mr. deButts made a speech at the annual convention of NARUC in which he laid out in some considerable detail the reasons for AT&T's position. AT&T filed its formal comments in FCC Docket 19528 opposing certification on these grounds in October 1973.

Early in 1974, the leadership of the FCC changed, first with the appointment of a new Chief of the Common Carrier Bureau on January 1, 1974, and shortly thereafter with the confirmation of a new Commission Chairman. Although this new leadership did not immediately repudiate the FCC's earlier consistent findings that the post-*Carterfone* tariffs complied with current FCC policy —indeed, in testimony before the United States Senate, the new Chairman took credit for maintaining the tariffs[14]—the Commission began rapidly to circumvent state regulatory opposition to certification. In January 1974, the FCC announced that it was

(Footnote continued from previous page)
economic burden" (Letter of January 6, 1972 from NARUC Staff Subcommittee to Robert Sims, Chairman, Subcommittee on Procedures and Enforcement, PBX Standards Advisory Committee, Federal Communications Commission).

[14]*Hearings on Review of the FCC Before the Subcommittee on Communications of the Senate Committee on Commerce*, 93d Cong., 2d Sess. at 13 (March 26, 1974) (Statement of Hon. Richard E. Wiley) ("*We have continued to require* that the connecting arrangements and NCSU equipment must be provided by the Bell System") (emphasis supplied).

preempting any exercise of state regulatory power over interconnection that was inconsistent with the interconnection practices permitted by the FCC;[15] and in April 1974, the FCC removed the economic issues from the Joint Board proceeding on certification and established a new docket for economic issues that would have no State participation.[16]

In the Spring of 1975 the Federal-State Joint Board issued its proposed certification plan—one which was limited to data and ancillary devices and which specifically continued the PCA requirement for telephone sets, key telephone systems and PBXs (the equipment at issue in *Litton* and *Faucett*).[17] The FCC essentially adopted this recommended certification plan in the Fall of 1975, but sent back to the Joint Board the question whether the certification program should be expanded to include main station telephone sets, key telephone systems and PBXs.[18] The Joint Board again affirmatively rejected certification of this equipment.[19] The FCC refused to accept that recommendation and in March 1976 ordered an expansion of the certification program to include main station telephone sets, key telephone systems and PBXs.[20] That order became effective in October 1977 upon this Court's denial of certiorari.[21]

[15]*Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[16]*Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures* (Docket 20003), 46 F.C.C.2d 214 (1974) (Notice of Inquiry).

[17]Recommended First Report and Order of the Federal-State Joint Board (Docket 19528), 53 F.C.C.2d 221 (1975).

[18]*Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593, 599-600 (1975) (First Report and Order).

[19]Recommended Second Report and Order of the Federal-State Joint Board (Docket 19528). *See* 58 F.C.C.2d 736, 737 (1976).

[20]*Interstate and Foreign MTS and WATS*, 58 F.C.C.2d 736, 746-47 (1976) (Second Report and Order).

[21]*See Interstate and Foreign MTS and WATS*, 67 F.C.C.2d 1255, 1256 (1978) (Third Report and Order).

The 1975-1976 FCC decisions that resulted from this activity essentially rewrote the 1968-1973 history of the post-*Carterfone* tariffs. In these decisions, the FCC simply ignored its repeated holdings that *Carterfone* dealt only with *attachments* to, not *substitutions* for, network equipment and facilities; the 1975-1976 decisions made no reference to the fact that the FCC had previously held that the post-*Carterfone* tariffs did not violate the *Carterfone* decision or the fact that the FCC's Notice of Inquiry in Docket 19528 had specifically excluded any issue concerning whether the tariffs violated *Carterfone*;[22] and the 1975-1976 decisions simply treated as non-existent the network definition issue out of which the telephone company-provided NCSU arose, while rejecting out-of-hand the related economic issues that had dominated the certification proceedings during the 1972-1974 period. Indeed, in contrast to the Recommended Decisions of the Joint Board, the FCC's 1975-1976 decisions made it appear that the economic issues were of trivial importance at best, and that a certification program for all types of equipment could and should have been adopted by AT&T following the *Carterfone* decision.

The result of all this was not only the establishment of what is now called the FCC's registration program but also the initiation of a number of antitrust actions against AT&T. This litigation was based upon the theory that, because the FCC ultimately ordered certification, such a program should have been established by AT&T itself following the *Carterfone* decision or that, in any event, the Bell System's filing of the post-*Carterfone* tariffs was in bad faith and its opposition to certification was a sham. The Government included such charges in its case. *United States* v. *American Tel. & Tel. Co.*, C.A. No. 74-1698 (D.D.C.). And a

[22]The FCC's 1972 Notice of Inquiry stated (35 F.C.C.2d at 542):

> "[T]his proceeding will not be concerned with any question relating to whether or not modification should be made in [the *Carterfone*] decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith."

number of private suits involving similar allegations were filed, including the *Litton* case.[23]

B. The Government Case

In the Government case, AT&T filed a motion to dismiss the equipment interconnection charges under Rule 41(b) at the close of the Government's case-in-chief. *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981).[24] Although denying AT&T's motion in part, Judge Harold H. Greene rejected the Government's theory that AT&T's opposition to certification before the FCC constituted a violation of the antitrust laws. Judge Greene held that such conduct was constitutionally protected under the *Noerr-Pennington* doctrine and that there was no basis for invocation of the sham exception to that doctrine (524 F. Supp. at 1354, 1363). Accordingly, Judge Greene ordered that these charges be stricken and held that AT&T did not have to address them in its defense (*id.* at 1381).

[23]Petitioners, quoting AT&T's 1983 petition for certiorari in *Litton*, implicitly represent (Pet. at 20) that at least 17 private treble damage cases raising the same issues as those resolved by the Court of Appeals still remain pending today. This representation is misleading. Most of those cases have now been settled. As of the date of this Opposition, only four cases of the seventeen are still pending. In three of these four cases the courts have already ruled against offensive collateral estoppel resting in part on grounds not raised by Petitioners. *See Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984); *Wrede* v. *American Tel. & Tel. Co.*, C.A. No. 83-283-1-MAC (M.D. Ga. May 30, 1984); *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984). In *General Dynamics Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-C-7941 (N.D. Ill.), a motion for application of collateral estoppel is presently pending. In addition, a case raising allegations similar to those herein was filed on December 7, 1984, *Shimazaki Comm., Inc.* v. *American Tel. & Tel. Co.*, No. 84 Civ. 8804 (S.D.N.Y.), but that case is barred by the statute of limitations.

[24]Although the Government case was ultimately concluded by a settlement agreement between the Government and AT&T, as the Court of Appeals noted (App. A at 6a), "the rulings [granting in part AT&T's Motion to Dismiss] and record developed prior to that settlement were fully litigated and are highly relevant here."

C. The *Litton* Case

In *Litton*, a marketer of PBXs and key telephone systems claimed injury arising from the PCA requirement in the post-*Carterfone* tariffs and contended particularly that AT&T's opposition to certification had delayed the ultimate FCC decision removing the PCA requirement for PBXs and key telephone systems. In contrast to Judge Greene's decision in the Government case, the *Litton* trial court permitted the case to go to the jury on the theory that AT&T's post-*Carterfone* tariff filing and opposition to certification fell within the sham exception to the *Noerr-Pennington* doctrine, and the jury returned a verdict against AT&T on that theory. The Second Circuit affirmed that verdict, on the ground, first, that the *Noerr-Pennington* doctrine was not even applicable to the conduct involved because such conduct sought to preserve an existing anticompetitive situation (700 F.2d at 806-09) and, second, that if it were applicable, the evidence supported the jury's finding that AT&T's conduct fell within the sham exception to the doctrine (*id.* at 809-12).

D. The Present Case

The first of the class actions consolidated herein was filed on July 31, 1981, raising claims similar to those alleged in *Litton*. Petitioners filed their motion for collateral estoppel on April 5, 1983, seeking estoppel on nine propositions which, taken together, would encompass Petitioners' entire liability case. In its order, the district court granted Petitioners' motion in its entirety, estopping defendants on every proposition as to which estoppel was sought (App. C at 41a-42a). However, reflecting its own doubt about the correctness of its decision, the district court *sua sponte* certified an interlocutory appeal pursuant to 28 U.S.C. §1292(b) (*id.* at 34a). On August 15, 1983, the Court of Appeals granted AT&T's Petition for Permission to Appeal. Following briefing, oral argument and a round of supplemental briefing, the Court of Appeals issued its decision on September 11, 1984.

The Court of Appeals found that "[o]n the record established and the reasons articulated by the district court, the application of offensive collateral estoppel fell below the minimum safeguards which must be present ere a party can be denied the right to present all of its defenses" (App. A at 2a). The Court of Appeals based this finding on three grounds.

First, the Court found that Respondents had been deprived of the requisite "full and fair" opportunity to litigate their liability in *Litton* because the *Litton* trial court had excluded evidence of state regulatory findings that the post-*Carterfone* tariffs were "reasonable" and "absolutely necessary" to protect the network from harm—evidence that the Second Circuit had found to have been erroneously excluded in *Litton* (App. A at 17a-18a). Applying the standards established in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 333 (1971), the Court of Appeals concluded that collateral estoppel was inappropriate because the excluded state regulatory findings constituted "crucial evidence" in the context of the issues in the case at bar that "could lead a jury in a new trial to reach a different result" (App. A at 21a).[25]

Second, and independent from its analysis of the "crucial evidence" issue, the Court of Appeals found that the conflicting *Noerr-Pennington* determinations in *Litton* and the Government case represented a "classic case of inconsistent determinations" (App. A at 26a-27a). Based upon this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332 (1979), that application of offensive collateral estoppel would be unfair where the judgment relied upon is inconsistent with other determinations of the same issue in other cases, the Court of Appeals concluded that

[25]Although strongly argued to it by Respondents, the district court did not even address the erroneous exclusion of state regulatory decisions in its opinion and thus did not consider whether AT&T was deprived of crucial evidence under the standards established in *Blonder-Tongue Laboratories*.

the inconsistency between *Litton* and Judge Greene's findings precluded application of offensive collateral estoppel (*id.* at 27a).

Finally, the Court of Appeals found that the estoppel applied by the district court exceeded the scope of the issues actually litigated in *Litton*. The Court of Appeals held (App. A at 27a-28a) that because the definition of the relevant market in *Litton* was not actually litigated, but instead was the subject of stipulation, collateral estoppel could not appropriately be applied to that definition. The Court of Appeals also held (App. A at 28a-29a) that the district court abused its discretion in granting collateral estoppel with respect to the claim that AT&T delayed in providing and installing PCAs for Litton in the absence of any showing by Petitioners that such conduct was involved in this case as well.

On October 9, 1984, Petitioners filed a petition seeking rehearing with a suggestion for rehearing *en banc*. The petition for rehearing and the suggestion for rehearing *en banc* were unanimously denied on October 22, 1984, with not a single Circuit Judge requesting a vote on the suggestion for rehearing *en banc* (App. B at 31a-32a).

REASONS FOR DENYING THE WRIT

The Question Presented in the Petition neither possesses national importance nor otherwise is appropriate for review by this Court. The sole aspect of the Court of Appeals' decision that Petitioners have properly challenged—that collateral estoppel was inappropriate because the trial court in *Litton* erroneously excluded "crucial evidence" that could lead a second jury to a different result—involves simply an application of well established principles to the facts of this case. Review of that kind of question plainly is not warranted. Nor, as will be shown below, should the Court review the independent and alternative ground of the Court of Appeals' decision—that collateral estoppel is inappropriate because the decision in *Litton* conflicts with the decision in *United States* v. *American Tel. & Tel. Co.* That ground is not even properly challenged in Petitioners' Question Presented and, in any event, also involves nothing more than an application of well

established principles to the facts of this case. Finally, review here is not appropriate because the Court of Appeals' decision is supported by other alternative grounds, which the Court of Appeals did not have to reach, including grounds relied upon by several district courts that have denied motions to give offensive collateral estoppel effect to *Litton*.[26]

I. THE COURT OF APPEALS CORRECTLY FOLLOWED THE DECISIONS OF THIS COURT IN CONCLUDING THAT IMPOSITION OF OFFENSIVE COLLATERAL ESTOPPEL WOULD BE UNFAIR WHERE DEFENDANTS HAD BEEN DEPRIVED OF THE OPPORTUNITY TO INTRODUCE "CRUCIAL EVIDENCE" IN *LITTON*.

Petitioners seek this Court's review of the question whether the Court of Appeals correctly determined that offensive collateral estoppel was inappropriate in the present case because AT&T was deprived of the opportunity to introduce "crucial evidence" in *Litton* showing that state regulatory commissions had approved the PCA requirement as reasonable. Petitioners raise four arguments in support of review of this issue by this Court (Pet. at 7-14).

The primary argument asserted by Petitioners is that the Court of Appeals applied an "erroneous legal standard" (Pet. at 9) which, Petitioners contend, effectively precludes application of

[26]Motions for collateral estoppel based upon *Litton* have now been considered in five cases, and those motions have been completely denied in four of those cases and partially denied in the fifth.

In addition to the decision of the Court of Appeals in *Faucett*, collateral estoppel motions have been denied in their entirety in *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984); *Wrede* v. *American Tel. & Tel. Co.*, C.A. No. 83-283-1-MAC (M.D. Ga. May 30, 1984); and *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984). In *Selectron, Inc.* v. *American Tel. & Tel. Co.*, 587 F. Supp. 856 (D. Or. 1984), the district court granted in part and denied in part plaintiffs' motion for collateral estoppel. However, that case relied heavily on the rulings of the district court in *Faucett*, which have now been rejected by three other district judges, as well as the Court of Appeals. The *Selectron* case was settled while a motion for an interlocutory appeal of the collateral estoppel ruling was pending in the district court.

offensive collateral estoppel in the District of Columbia Circuit (Pet. at 9, 14). Petitioners assert that the Court of Appeals has held that collateral estoppel should not be applied whenever there is a "mere possibility" that any piece of evidence excluded in one trial could cause a jury in a second trial to reach a different result (Pet. at 9, 10).

Petitioners' characterization distorts the decision below. The Court of Appeals repeatedly made clear that the standard it was applying—the standard set forth by this Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 333 (1971)—was whether AT&T had been deprived of the opportunity to introduce "crucial evidence" in *Litton* that "could lead a jury in a new trial to reach a different result" (App. A at 16a-17a, 20a, 21a).

Contrary to Petitioners' argument, the Court of Appeals did not apply this standard in a way that will preclude application of offensive collateral estoppel in the future. The court did not rule that *any* relevant evidence excluded from the prior trial would be sufficient to avoid collateral estoppel. Rather, it began with the fact that the Second Circuit itself had recognized that the trial court in *Litton* had erred in excluding a state regulatory decision approving the PCA requirement as "reasonable" and "necessary."[27] The *Faucett* court then considered the relationship of the excluded evidence of state regulatory approvals to the issues in *Litton* and the issues to be precluded in the present case and determined that the excluded evidence was indeed "crucial" (App. A at 18a, 20a).

The Court of Appeals' treatment of this issue was eminently sound. The issue in *Litton* (as well as in this case) concerned

[27] In *Litton* (700 F.2d at 819), the Second Circuit said with respect to the trial court's exclusion of the decision in *New York Tel. Co.*, 79 P.U.R.3d 410 (N.Y. Pub. Serv. Comm'n 1969):

> "We view this evidence as arguably probative of AT&T's position, and find it difficult to justify the exclusion of this decision in light of the admission of various FCC rulings."

whether AT&T acted in bad faith in filing tariffs requiring the use of a PCA and thereafter maintained those tariffs in bad faith by making "baseless" claims that PCAs were necessary to protect the telecommunications network from harm. The decisions of state regulatory agencies expressly finding such tariffs to be reasonable and necessary to protect the network from harm were relevant and, indeed, "crucial" to a balanced presentation of the evidence and a fair resolution of that issue. The *Faucett* court was thus plainly correct in holding that preclusion of a full trial on the merits of this issue would be unfair to AT&T.

Second, Petitioners argue (Pet. at 10) that the decision of the Court of Appeals in this case conflicts with the decision of the Second Circuit in *Litton* that the trial court's error in excluding state regulatory decisions did not justify reversal of the judgment in that case. That, of course, is not the issue here. As the Court of Appeals stated (App. A at 21a), quoting the Restatement (Second) of Judgments §29 comment j:

> "[T]he question is not whether a prior determination should be set aside but whether it should be treated as conclusive for further purposes."

Accord, *Carr* v. *District of Columbia*, 646 F.2d 599, 606 n.35 (D.C. Cir. 1980); *1776 K Street Associates* v. *United States*, 602 F.2d 354, 358 (Ct. Cl. 1979), *cert. denied*, 447 U.S. 905 (1980). Indeed, the Court of Appeals explicitly stated (App. A at 20a) that its conclusion on this point does *not* conflict with the Second Circuit's decision in *Litton*.[28]

Third, Petitioners assert (Pet. at 10-11) that the trial court in *Litton* did not exclude evidence which can be considered "crucial," because the trial court only excluded a single state regulatory decision. Petitioners claim that the Court of Appeals

[28]The Second Circuit predicated its refusal to reverse the jury verdict, in spite of its finding of error, on the difficulty of achieving perfection in a long and complicated proceeding (700 F.2d at 819). The Restatement (Second) of Judgments §29 comment g cautions against extending "the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality."

"erroneously speculated" in stating that AT&T intended to introduce other similar state regulatory decisions had the *Litton* court admitted the *New York Tel. Co.* decision (Pet. at 10). Petitioners' contentions are wholly without merit. To begin with, whether the excluded evidence consisted of one exhibit or one hundred exhibits is not determinative of whether or not the evidence is "crucial." *See, e.g., Butler* v. *Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977) (present availability of testimony of one witness excluded from prior trial precluded application of collateral estoppel).

Moreover, contrary to Petitioners' claim, there is ample support for the Court of Appeals' conclusion that the trial court's ruling in *Litton* had the practical effect of excluding other state decisions upholding the PCA requirement. AT&T had included several other such state regulatory decisions on its exhibit list and pretrial filings in *Litton*. When AT&T offered the first of these decisions, the *New York Tel. Co.* decision, into evidence in *Litton*, the trial court rejected it as irrelevant (*Litton* Tr. 11381). The same ruling would have been equally applicable to the other state regulatory decisions which AT&T had intended to introduce and, thus, after the test case on the first decision, offering the others would have been pointless.[29]

[29]Petitioners argue (Pet. at 11) that AT&T intended to introduce just one state regulatory decision in *Litton* by quoting out of context the statement by AT&T's counsel that he would go into "just this one" decision *with the particular witness who was then on the stand.* A review of even the partial *Litton* transcript included in Petitioners' Appendix D makes clear that AT&T's counsel was simply stating that he would limit his examination at that point in the trial to the New York Public Service Commission decision because the witness then on the stand had testified before that state agency (App. D. at 48a). On the transcript page immediately following the pages included in Petitioners' Appendix D, counsel for AT&T made clear that he viewed the trial court's ruling excluding the *New York Tel. Co.* case as broadly applicable to the other state decisions that were included on AT&T's exhibit list, arguing that having permitted Litton to introduce the FCC registration orders, "not letting in state *decisions* would be unbalanced" (*Litton* Tr. 8352) (emphasis supplied).

Finally, Petitioners contend (Pet. at 11) that state regulatory decisions are irrelevant because the FCC in *Telerent*[30] preempted state regulation of interconnection retroactively back to the 1934 enactment of the Federal Communications Act. There is no substance to that claim. First, under the Communications Act, the States continued to share regulatory jurisdiction with the FCC unless and until the FCC issued a preemption order.[31] Clearly, AT&T and its operating companies had to abide by state regulatory policies before *Telerent* was issued and became effective. Indeed, Petitioners' contrary argument directly conflicts with the views of both the Court of Appeals for the District of Columbia Circuit in *Faucett* and the Second Circuit in *Litton* that evidence concerning state regulation is probative of the reasonableness of AT&T's conduct.[32] Moreover, contrary to Petitioners' reading of *Telerent*, that decision did not foreclose the States from making independent determinations that PCAs were reasonable and should be required. The FCC in *Telerent* merely precluded state regulators from prohibiting interconnections then permitted by the FCC and required them to maintain at the minimum the PCA requirement in the post-*Carterfone* tariffs then in force (45 F.C.C.2d at 221).

[30]*Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[31]On numerous occasions prior to *Telerent*, the FCC explicitly acknowledged the *shared* nature of its regulatory jurisdiction over equipment interconnection issues. *See, e.g., Jordaphone* v. *American Tel. & Tel. Co.*, 18 F.C.C. 644, 670 (1954) ("the use of automatic telephone answering devices raises a problem of joint jurisdiction"). The FCC continued to adhere to that view even in initiating its Docket 19528 inquiry into certification of terminal equipment. *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 541 (1972) ("we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and interstate communication services").

[32]*See also Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 664 F.2d 716, 723 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 785 (1983) (evidence of state regulation is relevant to the reasonableness of AT&T's conduct regarding the post-*Carterfone* tariffs).

In sum, the Court of Appeals was correct in holding that crucial evidence was excluded in *Litton* and that evidence may well make all the difference in the trial of this case. Hence, the trial here will not merely be a "replay" of the trial in *Litton*, as Petitioners contend (Pet. 6, 20). AT&T will be able to show that its filing of the post-*Carterfone* tariffs and its opposition to certification—the very conduct at issue here—was not only reasonable, but that it was in the public interest in the judgment of scores of state regulators all over the country who were vitally concerned with interconnection practices.[33] Petitioners have provided no reasoned basis for this Court to intervene to prevent that kind of trial.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT OFFENSIVE COLLATERAL ESTOPPEL WOULD BE UNFAIR WHERE THE *LITTON* JUDGMENT CONFLICTED WITH THE DETERMINATION OF THE SAME ISSUES FOR DEFENDANTS IN *UNITED STATES v. AMERICAN TEL. & TEL. CO.*

As noted above, the Court of Appeals' decision reversing the district court's order rested on multiple grounds that are largely independent. Although Petitioners in their argument challenge the Court of Appeals' independent finding that collateral estoppel would be inappropriate because *Litton* conflicts with the *Noerr-Pennington* determination of Judge Greene in *United States* v. *American Tel. & Tel. Co.*, Petitioners have not properly raised that finding for review. *See* Rule 21.1(a) of the Rules of this Court.[34] In these circumstances, the Writ should be denied, not only because it does not raise a meritorious ground for this Court's consideration, but also because it fails to raise for review the independent bases for the decision below.

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[33] *See, e.g.*, decisions cited at p. 6 n. 11, *supra*.

[34] The Question Presented by Petitioners addresses only that portion of the decision below finding that collateral estoppel was inappropriate because of the erroneous exclusion of state regulatory decisions in *Litton*.

(Footnote continued on following page)

Moreover, even if it were properly before this Court, the holding of the Court of Appeals that collateral estoppel is inappropriate in view of the "stark" inconsistency between Judge Greene's Rule 41(b) decision in the Government case and the contrary determinations of the jury in *Litton* (App. A at 26a-27a) does not warrant this Court's review. The Court of Appeals' holding merely applies established principles in a way that is clearly correct, and none of Petitioners' contentions to the contrary has the slightest merit.[35]

First, Petitioners contend (Pet. at 14-16) that this Court in *Parklane Hosiery, Inc.* v. *Shore*, 439 U.S. 322 (1979), established that application of offensive collateral estoppel could only be precluded if there existed a final "judgment" that was inconsistent with the outcome of the case relied upon for estoppel. Petitioners argue that Judge Greene's ruling constitutes merely an interlocutory "determination" rather than a "judgment" and for that reason does not preclude offensive collateral estoppel.

The Court of Appeals explicitly rejected this argument, noting that nothing in *Parklane Hosiery* supports Petitioners' "arbitrary distinction between judgments and other judicial determinations"

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Nothing in the Question Presented challenges the Court of Appeals' conclusion that collateral estoppel is precluded because *Litton* conflicts with the *Noerr-Pennington* determination in the Government case. Petitioners' discussion of that issue only in their argument is insufficient to raise the issue for review. *See, e.g., General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-79 (1938); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 428-29 (1964); *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 357 n.2 (1940).

[35]Three other district courts have also concluded that this inconsistency precludes giving collateral estoppel effect to *Litton*. *See Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984); *Wrede* v. *American Tel. & Tel. Co.*, C.A. No. 83-283-1-MAC (M.D. Ga. May 30, 1984); *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984).

(App. A at 23a-24a).[36] Moreover, the Court of Appeals did not hold that any mere determination in another case could preclude offensive collateral estoppel (App. A. at 24a-25a). Rather, the Court of Appeals carefully considered the circumstances of Judge Greene's Rule 41(b) decision and concluded that Judge Greene's decision was "sufficiently definite and firm on the *Noerr-Pennington* issue" (App. A at 25a) to be significant for collateral estoppel purposes.

The Court of Appeals' approach to the question is fully consistent with the standards of practical finality that have long been used in federal courts and that have now been adopted by the Restatement (Second) of Judgments §13.[37] Indeed, courts have often held partial adjudications, comparable to Judge Greene's Rule 41(b) order that the Government's charges regarding AT&T's opposition to certification before the FCC be stricken, to be sufficiently final as to be treated as conclusive for collateral estoppel purposes.[38] Clearly, the Court of Appeals' application of

[36]The Court of Appeals also noted (App. A at 24a) that the draft of the Restatement (Second) of Judgments, referenced by this Court in *Parklane* (439 U.S. at 331), used the term inconsistent "determinations," as does the final version of the Restatement (Second) of Judgments §29(4) and comment f. *Cf. Crawford* v. *Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981) (holding that inconsistent judicial interpretations of the terms of an insurance contract precluded offensive collateral estoppel on the meaning of the disputed contract clause).

[37]*See* Restatement (Second) of Judgments §13 and comment g (for purposes of collateral estoppel the "final judgment" requirement "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect"). *See also Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F.2d 80, 87-90 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Miller Brewing Co.*, v. *Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Dyndul* v. *Dyndul*, 620 F.2d 409, 411-12 (3d Cir. 1980).

[38]*See, e.g., In re Cenco, Inc. Securities Litigation*, 529 F. Supp. 411, 416 n.5 (N.D. Ill. 1982); *In re Falstaff Brewing Corp. Antitrust Litigation*, 441 F. Supp. 62, 66 (E.D. Mo. 1977). See *generally* 1B J. Moore,

(Footnote continued on following page)

those well-established principles in this case does not merit this Court's review.[39]

Second, Petitioners contend (Pet. at 16) that "Judge Greene's opinion . . . is wholly consistent with *Litton*," citing other portions of Judge Greene's opinion stating that the Government had made out a *prima facie* case. However, Petitioners' attempt to focus attention on those portions of Judge Greene's decision other than his treatment of the *Noerr-Pennington* issues is beside the point.[40] The *Litton* jury findings with respect to the PCA tariff filing and opposition to certification issues rested solely on the jury's finding

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Moore's Federal Practice ¶0.441[4] at pp. 744-47 (2d ed. 1983) (reviewing cases giving collateral estoppel effect to a partial grant of a motion to dismiss, partial summary judgment and other partial adjudications).

[39]In support of their assertion that Judge Greene's Rule 41(b) decision is not significant for collateral estoppel purposes, Petitioners also cite (Pet. at 16) the decision in *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 1011, 1022 (D.C. Cir. 1984). Petitioners contend that the court's holding in *Southern Pacific* that Judge Greene's decision was not final conflicts with the treatment of the decision in *Faucett*. In *Southern Pacific*, however, plaintiffs had sought to impose offensive collateral estoppel based upon those portions of Judge Greene's decision that *denied* AT&T's motion to dismiss, not those portions referred to by the Court of Appeals in *Faucett* which *granted* the motion in part. Thus, the holding in *Southern Pacific* that other portions of Judge Greene's decision were not final for purposes of offensive collateral estoppel in no way conflicts with *Faucett*. Indeed, Petitioners raised this purported conflict between the two panels of the Court of Appeals in seeking rehearing *en banc* of the *Faucett* ruling, and no participating judge of the full court found merit in that argument.

[40]Contrary to Petitioners' representations, Judge Greene never found that *any* of AT&T's conduct challenged by the Government violated the antitrust laws. At the time of the Rule 41(b) decision, Judge Greene explicitly stated that it was "absolutely clear" that he had made no final determination of liability with respect to the Government's remaining allegations and that defendants "may well succeed in disproving everything" established in the Government's case-in-chief (*United States* v. *American Tel. & Tel. Co.*, No. 74-1698 (D.D.C.), Tr. 14,910 (Sept. 11, 1981)). *See also Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 1011, 1022 (D.C. Cir. 1984).

of a sham under the *Noerr-Pennington* doctrine.[41] As the Court of Appeals observed, Judge Greene's *Noerr-Pennington* ruling dismissing the Government's claims is directly inconsistent with the *Noerr-Pennington* determination of the jury in *Litton* imposing liability on defendants for the same conduct (App. A at 26a-27a).

Finally, Petitioners challenge the Court of Appeals' statement (App. A at 27a) that the records in *Litton* and before Judge Greene were "largely the same," asserting (Pet. at 18) that there were some differences in the records in the two cases.[42] However, there will always be some differences in the records of two litigated cases on the same issue. If Petitioners were correct in their assertion that inconsistent determinations could arise only from *identical* records, there would never be a case in which that exception applied. The *Faucett* case is consistent with cases from other circuits that have found inconsistent determinations without requiring exact duplication of all of the evidence in both cases.[43]

[41]Indeed, the jury found that the PCAs themselves were not "unduly expensive, inefficient or unreliable" (*Litton* Jury Interrogatory No. 16(d)).

[42]The Court of Appeals was clearly correct in its conclusion that the inconsistent determinations in *Litton* and the Government case rested upon largely the same facts. The Government case was litigated contemporaneously with the *Litton* proceedings; the *Litton* allegations and evidence constituted a separate "episode" presented by the Government in its case (*see* 524 F. Supp. at 1349 n.40), and Judge Greene ordered that the Government have access to the document discovery taken by Litton of AT&T. *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1340-41 and n.79 (D.D.C. 1978). The Government's counsel worked closely with Litton's counsel and introduced into the record in the Government case evidence and trial testimony directly from the *Litton* case, including the *Litton* testimony of Mr. deButts and numerous other witnesses. Thus, any evidence contained in the *Litton* record but not in the record of the Government case simply reflects the assessment of the Government's counsel that such evidence was cumulative or immaterial.

[43]*See, e.g., Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982); *Crawford* v. *Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981).

In any event, as the Court of Appeals observed, the evidence introduced in *Litton* included documents that were the same as or similar to documents Judge Green identified as protected by the *Noerr-Pennington* doctrine in his decision dismissing certain of the Government's claims (App. A at 26a).[11]

In sum, the Court of Appeals was correct in concluding that the judgment in *Litton* was inconsistent with Judge Greene's decision in the Government case. Even if Petitioners properly raised this issue for review, they have made absolutely no showing that review of the issue is warranted.

III. REVIEW BY THIS COURT IS INAPPROPRIATE BECAUSE OTHER INDEPENDENT GROUNDS SUPPORT THE REFUSAL OF THE COURT OF APPEALS TO GIVE COLLATERAL ESTOPPEL EFFECT TO *LITTON*.

For the reasons stated above, neither the issue which Petitioners raise in the Question Presented, nor the other matters they address only in their argument warrant this Court's review. In addition, the Court of Appeals' holding that application of offensive collateral estoppel based on the judgment in *Litton* would be inappropriate is supported by grounds that the Court of Appeals did not reach but which further demonstrate both the correctness of its decision and the inappropriateness of review by this Court.

The doctrine of collateral estoppel is premised on an "underlying confidence" in the correctness of the judgment relied upon. *Standefer* v. *United States*, 447 U.S. 10, 23 n.18 (1980); Restatement (Second) of Judgments §29 comment f. In the instant case that "underlying confidence" is wholly lacking because the

[11] Petitioners also point to the fact (Pet. at 18) that Judge Greene held that some *Noerr*-protected evidence might nonetheless be admitted for limited purposes (524 F. Supp. at 1363 n.110). However, as the Court of Appeals recognized (App. A at 26a), the *Noerr*-protected evidence introduced in *Litton* was not admitted for limited purposes but was continuously referred to by plaintiffs in that case as a basis for imposing liability for bad faith submissions to the FCC.

central premise upon which the judgment in *Litton* rested is demonstrably false. Indeed, the *Litton* decision stands discredited by virtually everyone familiar with the regulatory history from which the allegations in *Litton* arise.

The judgment in *Litton* rested upon one critical premise—that the FCC's *Carterfone* decision required AT&T to permit the interconnection of all terminal equipment, including PBXs and key telephone systems, absent an affirmative showing of harm to the telecommunications network, and that the post-*Carterfone* tariffs on their face violated this requirement. Thus, the Second Circuit reasoned that *Carterfone* was applicable to PBXs and key telephone systems (700 F.2d at 810); that both AT&T's post-*Carterfone* tariffs and its opposition to certification represented an intentional violation of what AT&T clearly had to know was its legal obligation following *Carterfone* (*id.* at 794); and that AT&T must have known that its opposition to certification was a "sham," since AT&T knew or should have known that it "had no realistic hope that the FCC would approve the interface device" (*id.* at 811).

Within days of the Second Circuit's decision, former FCC Commissioner Benjamin L. Hooks filed a memorandum with the Second Circuit urging reconsideration of the decision by that court, stating (at 3):

> "[T]he regulatory history of the controversy over customer-owned terminal equipment has been so grossly distorted [in the Second Circuit's *Litton* opinion] that no one who participated in, and knows about, the events of that era would even recognize that that is what the Court is trying to describe."

Shortly thereafter, Bernard Strassburg, the Chief of the FCC's Common Carrier Bureau from 1963 to 1973, and the principal author of the FCC's 1968-73 decisions explaining the meaning of *Carterfone*, specifically rejected *Litton's* view of *Carterfone* and subsequent FCC decisions, stating in deposition testimony in

Phonetele, Inc. v. *American Tel. & Tel. Co.*, C.A. No. CV-74-3566-MML (C.D. Cal.) that *Litton's* reading of *Carterfone* was "certainly not correct" and that he "really can't agree" that AT&T had no realistic hope that the FCC would approve the PCA requirement in Docket 19528 (Strassburg Dep. at 74, 123).

Subsequently, even the Department of Justice, which pursued its own case against AT&T on essentially the same theory as did Litton, which therefore supported Litton's position in this Court, and which can hardly be considered to be a neutral, objective observer in this instance, acknowledged that *Litton* erred in its reading of *Carterfone*. In its *amicus curiae* brief filed at the request of this Court, the Department of Justice pointed out that *Litton* concluded "incorrectly" that *Hush-a-Phone* and *Carterfone* were applicable to the PBXs and key telephone systems at issue in *Litton* (Brief of the United States as *Amicus Curiae* filed December 16, 1983, at 20-21).

Finally, if any doubt concerning the inaccuracy of the premises underlying *Litton* could possibly remain, that doubt was dispelled by the FCC's statement as *amicus curiae* in this case filed in the Court of Appeals on February 24, 1984. In its statement, the Commission stated explicitly that the Second Circuit had "mischaracterized" the *Carterfone* decision by finding it to be applicable to PBXs and key telephone systems (*id.* at 1-2), and further that the Second Circuit's assumption that the post-*Carterfone* tariffs violated the mandate of *Carterfone* was in "error" (*id.* at 3).

Although the Court of Appeals found it unnecessary to reach this issue in its decision below, other courts have expressed reservations about the correctness of the *Litton* decision. In *Phonetele,*[*] the court refused to give collateral estoppel effect to *Litton* on the ground that it had "doubt about the correctness of the *Litton Systems* decisions on the applicability of the [*Noerr-Pennington*] doctrine to the opposition to certification."

[*] *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984).

Further, in Glictronix,[46] the court questioned the reliability of the 1975-1976 FCC decisions that had formed the basis of the Second Circuit's opinion in *Litton*. The *Glictronix* court held that collateral estoppel should not be applied to the judgment in *Litton* in part because new evidence indicated that the Chief of the FCC's Common Carrier Bureau between 1974 and 1978, Walter Hinchman, who was responsible for preparing these decisions for the Commission, improperly engaged in a program to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System. The court held that such new evidence drew into question the trustworthiness (and thus the admissibility under Rule 803(8)(C) of the Federal Rules of Evidence) of those FCC decisions finding AT&T's post-*Carterfone* tariffs to be unlawful—decisions which the Second Circuit described as "central" to plaintiffs' claims in *Litton* (700 F.2d at 818).[47]

Under these circumstances, the Writ should be denied because review, and even reversal, of the decision of the Court of Appeals now before the Court might have no practical effect in the case given the existence of grounds that the Court of Appeals did not reach and which fully support the result below.

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[46] *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984).

[47] The court in *Glictronix* referred particularly to the record developed after the *Litton* verdict in the trial of *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, C.A. No. 78-0545 (D.D.C.). At the conclusion of the *Southern Pacific* case, the district court found (556 F. Supp. 825, 1056-57 (D.D.C. 1983), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984)):

> "The inference is justified that under the direction of Mr. Hinchman, whom the Court found to be lacking in candor and trustworthiness, the staff launched into a program to protect the specialized carriers from competition from AT&T and *to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System.*" (Emphasis supplied.)

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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